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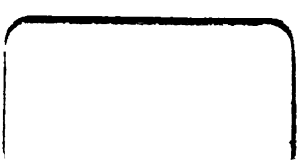

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WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

AUGUST 2, 1907--DECEMBER 3, 1907

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JUDGES

OF THE

SUPREME COURT OF WASHINGTON

DURING THE PERIOD COVERED IN THIS VOLUME

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ERRATA

Page 236, 1st syllabus, line 2, insert not after does
Page 382, syllabus, line 9, for debtors read creditors

ERRORS NOTED IN PREVIOUS VOLUMES

VOLUME 46

Page 134, line 16 from bottom, for instruction read instrument

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 6617. Decided August 2, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. LIN KATON, *Appellant*.[1]

CRIMINAL LAW—TRIAL—PROVINCE OF COURT—APPEAL—REVIEW—RAPE—EVIDENCE—SUFFICIENCY. The appellate court cannot say, as a matter of law, that the evidence of a prosecuting witness is so far impeached by her own testimony and other witnesses that the same is insufficient to justify a conviction of rape, where it was corroborated, and the jury and trial court found it sufficient (ROOT, J., dissenting).

WITNESSES—CROSS-EXAMINATION. In a criminal prosecution it is proper to allow cross-examination of the defendant's witnesses tending to discredit their positive statements.

APPEAL—RESERVATION OF GROUNDS—EXCEPTIONS. A general exception to an instruction containing several distinct propositions, some of which are free from error, is insufficient to secure a review of the objectionable portion.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 2, 1906, upon a trial and conviction of the crime of rape. Affirmed.

W. H. Abel, for appellant.

E. E. Boner, for respondent.

[1]Reported in 91 Pac. 250.

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This evidence is far from convincing, and even if true, would have little bearing upon the question of defendant's guilt. Seeing two girls and two men in a town on a street that, if followed, would lead to another town three or four miles distant, is not very positive evidence that one of the men committed rape on one of the girls in the other town that night. The baby was shown to the jury. It had blue eyes. The eyes of the defendant are brown and those of the mother black. The prosecuting witness also admitted saying, a few hours before the trial, that if she did not swear against defendant, her father would kick her out of the house. In explanation of her former testimony (that defendant was innocent), she said she had promised to shield him. She gave no reason as to why she should shield him instead of her brother-in-law. She admitted that defendant had offered her no inducement. Said she met him by chance on the street after her baby was born, and after a former charge against him had been dismissed, and promised (at a time when no charge was pending) to shield him.

It is urged that, the jury having found the defendant guilty and the trial court having refused a new trial, this court should not review the question. I do not think we can escape responsibility so easily. Subdivision 6 of § 6965, Bal. Code (P. C. § 2217), gives as a ground for granting a new trial the following: "When the verdict is contrary to law and evidence." This means that somebody must pass upon the question of whether the jury has returned a verdict "contrary to law and evidence." This duty devolves first upon the trial judge. If he denies the motion, his ruling can be assigned as error upon appeal. That assignment of error must then be examined by this court. It becomes our duty to say whether the ruling was error or not. To do so, we must examine and pass upon the evidence. The statute leaves us no other course. To be sure, this court should be slow to reverse the action of a trial court in denying a new trial because of alleged insufficiency of evidence, and especially

where the trial judge is of the ability and character of him who presided at this trial. But where this court is clearly convinced that the verdict is, in the language of the statute, "contrary to law and evidence," it is the duty of the court to set aside the verdict, thereby correcting the error of the trial court in not so doing. Above and beyond all technical considerations, is the paramount and inflexible demand of our jurisprudence that every defendant shall be entitled to a fair trial and be convicted of crime only upon evidence showing his guilt beyond a reasonable doubt. How any court can say that this evidence shows this defendant to be guilty beyond any reasonable doubt, or hold that any jury might properly have so found, is more than I can understand.

The statute making it a felony for a man to have illicit sexual intercourse with a girl under eighteen is a good law. It was intended to protect innocent, inexperienced, imprudent girls. It was not enacted for the benefit of "street-walkers," nor as an encouragement to blackmailers. Every conviction like the one before us is calculated to bring this law into disrepute. A noted judge once said that rape was a hard charge to prove and a much harder one to disprove. The latter portion of this observation becomes especially pertinent if a conviction is to be sustained upon such testimony of a confessed perjurer as we find here. Few things militate against a good law more than an unjust, unreasonable, and offensive enforcement thereof in a manner whereby its spirit and purpose are sacrificed to its letter or form. Such a proceeding tends to discredit the statute and to defeat its usefulness and legitimate objects.

I think the law and justice demand a reversal of the judgment in this case.

[No. 6708. Decided August 5, 1907.]

WILLIAM L. O'CONNELL, *Respondent*, v. CHARLES E. MARVIN *et al.*, *Appellants*.[1]

BILLS AND NOTES — LIABILITY ON INDORSEMENT — PRINCIPAL AND AGENTS—BROKERS—FOR WHOM ACTING. Where the owner of lands agreed with C. with respect to a net price at which C. might sell the property, brokers employed by C. to effect a sale are not agents of the owner, where it appears that they found a prospective purchaser and took from him a draft and indorsed the same over to the owner, without limitation, as a first payment demanded by the owner, which was to be forfeited in case the other payments were not made; hence the brokers are liable to the owner on their indorsement upon dishonor of the purchaser's draft.

Appeal from a judgment of the superior court for King county, Tallman J., entered November 24, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon a bank draft. Affirmed.

McBride, Stratton & Dalton, for appellants.

Samuel Morrison, for respondent.

PER CURIAM.—This is an action upon a bank draft. The draft in question was taken by the appellants in part payment of the purchase price of certain real property owned by the respondent and which the appellants, who are real estate agents, held for sale. It appears from the record that in 1904 the property was owned by one Cummings. Cummings at that time was in need of money, and the respondent purchased the property of him at an agreed price for his accommodation, and at the same time gave Cummings the privilege of reselling it at a net price to the respondent of a fixed sum, agreeing to give him all that he could obtain for the property over and above the sum so fixed. Cummings listed the property with the appellants. In October, 1905, the appellants found

[1]Reported in 91 Pac. 254.

a prospective purchaser in one A. J. Palmour, and received, as earnest of the prospective sale, his draft on Molson's bank, of Port Arthur, Ontario, for $100, and his draft on A. V. Palmour, of the same place for $400, the latter draft being the draft in suit. Cummings was notified of the prospective sale, by the appellants, and he in turn approached the respondent and asked him to enter into a written contract agreeing to sell the property on payment of the purchase price on or before November 1, 1905, tendering him at the same time the appellant's check for $100. The respondent told Cummings that he was willing to sell on the terms proposed, but did not want to tie up the property until November 1 for such a small sum, and unless a larger sum as earnest money could be paid, he would not sign the contract. Cummings thereupon told him to call at the appellant's offices the next morning when he thought the matter could be arranged. The respondent did call as requested, and after some negotiation, the appellants agreed to endorse and turn over to him the $400 draft. The contract was thereupon signed and the draft delivered to the respondent. The respondent presented the draft to his banker, when it was discovered that it had not been indorsed by the appellants. He returned with it shortly thereafter to them, received their indorsement, and had it forwarded for collection. The drawee failed to honor the draft, and it was returned to the respondent, who thereupon called upon the appellants to make good their indorsement, and on their refusing to do so, instituted this action. The contract of sale above mentioned was as follows:

"Seattle, Wash., Oct. 3rd, '05.

"Received from Chas. E. Marvin & Sons Co., for account of a client Four Hundred Dollars, as surety deposit payment made by them on the purchase made by their client of seventeen (17) acres of land near the mouth of the Duwamish River and known as the E. M. Tatterson tract and particularly described as follows:

"Beginning at a point on the west line thereof, distant 21.38 rods south of the north line thereof; thence east 125.46

rods more or less to a point distant 24.54 rods from the east line of said southwest quarter; thence south 14 deg. 22′ east 17.60 rods; thence south 39 deg. east 5.39 rods to a point distant 16.75 rods west from the east line of said southwest quarter; thence west 133.25 rods more or less to the west line of said southwest quarter; thence north along said west line 21.37 rods to the place of beginning.

"The purchase price of this property is thirty-seven hundred ($3700) dollars to me with a condition that any margin which you secure in selling this property above thirty-seven hundred dollars shall be the total brokerage allowed you for selling the property.

"Payments: Four Hundred ($400) Dft. the receipt of which is hereinabove acknowledged and thirty-three hundred dollars ($3300) payable on or before November 1st, 1905. The object of the extension being to enable you to have the time till November 1st, 1905, to fully close up the deal if necessary. If not closed by this time the Four Hundred ($400) shall be forfeited, with the condition if the title is not satisfactory and complete to your attorney I will return the Four Hundred Dollars ($400) received this day. Deed to be made as ordered. W. L. O'Connell.

"Witness: M. J. Cummings."

The appellants contend that they are not liable on their indorsement for the reason that they were the respondent's agents, authorized by him to sell the property, and that when they did sell it and took the draft from the purchaser they took it as the respondent's property, and their indorsement was nothing more than a means of transferring the legal title to the respondent, being necessary because the draft was payable to them; and they cite cases maintaining the rule that an agent who takes negotiable paper in his own name and indorses the same to his principal is not liable thereon, unless it is expressly agreed or intended that he shall assume a personal liability.

But we think this rule has no application here. The appellants were in no sense the agents of the respondent. They were not empowered to make contracts for him or in his name, nor did they bear to him any fiduciary relation whatever. On

the contrary, they dealt with him at arm's length, and owed him only that duty that every man owes to another with whom he contracts, namely, to deal honestly, and not overreach his co-contractor by fraud or deceit. The appellants' act, therefore, in indorsing the check, was not the act of the respondent. Did they indorse it then for the purpose of obligating themselves upon it? We think there can be no dispute upon this question. The indorsement was without limitation of any kind; and the draft was delivered as a payment to the respondent under a contract entered into between him and the appellants, to be returned by him only on condition that the title he had to the land, when called upon to make a deed, was not satisfactory to the appellants' attorney. There was no forfeiture under this condition. The draft, therefore, became the absolute property of the respondent, and he had the right to enforce it against the indorsers as well as against the drawer.

The judgment is affirmed.

[No. 6681. Decided August 5, 1907.]

THE STATE OF WASHINGTON, *on the Relation of C. C. Pagett et al., Plaintiff*, v. THE SUPERIOR COURT FOR PIERCE COUNTY *et al., Respondents.*[1]

HIGHWAYS—ESTABLISHMENT—PROCEEDINGS — EMINENT DOMAIN—CERTIORARI—MATTERS REVIEWABLE. Upon certiorari to review an adjudication of public use in a proceeding to condemn land for a county road, the supreme court cannot review the preliminary proceedings had before the board of county commissioners for the establishment of the road, where the board had acquired jurisdiction of the persons and property.

SAME—FINDINGS BY COMMISSIONERS—COLLATERAL ATTACK. A finding by county commissioners, in a proceeding to establish a county road, that the petition was signed by ten householders of the county residing in the vicinity is conclusive, and cannot be attacked collaterally on certiorari to review an adjudication of public use in proceedings to condemn property for the road.

[1]Reported in 91 Pac. 241.

Same—Jurisdiction—Presumptions. Jurisdiction, once acquired to establish a county road, cannot be collaterally attacked, subsequent proceedings being presumed regular.

Same—Viewers—Notice—Statutes—Amendment. Under Laws 1901, p. 200, amending the county road law so as to dispense with viewers, and providing that the county surveyor shall perform all the duties of the viewers, the sections of the act relating to the duties and reports of viewers must be interpreted as referring to the county surveyor; and notices drawn accordingly are sufficient.

Highways—Establishment—Damages—Eminent Domain—Certiorari—Matters Reviewable. Upon certiorari to review an adjudication of public use, in a proceeding to condemn land for a county road, the awarding or ascertainment of damages cannot be reviewed.

Eminent Domain—Public Use. The appropriation of land for a county road is necessarily for a public use.

Certiorari to review a judgment of the superior court for Pierce county, Chapman, J., entered February 18, 1907, after a hearing on the merits, adjudging a public use in an action to condemn land for the use of a highway. Affirmed.

Titlow & Huffer, for relators.

H. G. Rowland and *F. Campbell*, for respondents.

Crow, J.—On March 31, 1905, a petition and bond were filed with the commissioners of Pierce county for laying out and establishing a county road to be known as the "Julius Gulch" road. Such proceedings were had that Pierce county afterwards filed in the superior court a petition to condemn for said road certain land belonging to C. C. Pagett, Mabel Pagett, and Bridget Duffy, the relators herein, and the superior court, after taking evidence, adjudged that the purpose for which the land was sought to be condemned was a public use. Thereupon the relators applied to this court for a writ of review. Upon notice, the county appeared, interposed objections, and resisted the application, contending that the relators had an adequate remedy by appeal. In a written opinion, 46 Wash. 35, 89 Pac. 178, we granted the writ, returnable May 1, 1907. A transcript of the record and proceed-

ings having been fully certified to this court, the same is now before us on final hearing.

It appears that the original petition for the establishment of the road, upon its face, purported to be signed by ten householders; that it complied in all respects with the requirements of Bal. Code, § 3773 (P. C. § 7822); that it was accompanied by a bond executed in due and legal form; that it was referred to the county surveyor who filed his report; that the relators failed to file any written waiver of damages, or claim for damages; that personal service of notice of hearing was made on the relators; that the commissioners ordered the road to be established; that a tender of damages was made to each of the relators, which they failed to accept, and that condemnation proceedings were ordered. The relators, in their assignments of error, have directed our attention to certain alleged irregularities which they insist render all proceedings before the county commissioners null and void. Although these alleged irregularities are regarded by us as immaterial, some of them will be hereinafter discussed. The relators have, in fact, presented many assignments of error which it will be unnecessary for us to consider by reason of our views on the jurisdictional questions raised. The substance of their contention seems to be, that in this action we are authorized to fully review all proceedings had before the county commissioners preliminary to their orders establishing the road and directing condemnation.

The primary purpose of the writ issued herein is to enable us to review the order of the superior court adjudging that the purpose for which the relators' land is sought to be taken is a public use, and not to review the acts of the county commissioners. While it is true that statutes delegating the right of eminent domain are to be strictly construed as in derogation of private rights, we do not think that, in a proceeding of this character, instituted for the sole purpose of reviewing an order adjudging a public use, we can be called upon to critically examine or review all the preliminary proceedings

had before the board of county commissioners. The commissioners had, under the statute, jurisdiction of the subject-matter of establishing the road. As shown by the record and by the filing of a proper petition and bond approved by them, and service of process thereon, they also acquired jurisdiction of the persons and property of the relators. As it further appears that damages have been tendered to the relators, which they have declined to accept; that the commissioners have established the road, and that they have directed condemnation, no further inquiry can be here made into the preliminary road proceedings. All these facts having been pleaded and shown, nothing more can be required.

The relators nevertheless contend that the trial court erred in refusing them permission to show that some of the signers of the road petition were not householders, as required by Bal. Code, § 3772 (P. C. § 7821), and insist that they were entitled to attack the sufficiency of the petition in that regard, and the jurisdiction of the county commissioners. In support of this position they cite *Mulligan v. Smith*, 59 Cal. 206, afterwards cited and followed in *Zeigler v. Hopkins*, 117 U. S. 683, 6 Sup. Ct. 919, 29 L. Ed. 1019. From the opinion in *Mulligan v. Smith* it affirmatively appears that the statute did not authorize the mayor to enter into any investigation of the frontage represented by the petition, or to adjudicate its sufficiency. Our statute, 3 Bal. Code, § 3775 (P. C. § 7824), confers upon boards of county commissioners such judicial authority. They are authorized to consider and pass upon the sufficiency of the petition and bond. The records introduced in evidence show that the commissioners affirmatively determined and found that the petition was signed by at least ten householders of the county residing in the vicinity of the road, and that it was accompanied by a bond approved by the board. Such finding cannot be attacked in this collateral proceeding. It shows jurisdiction in the commissioners. *In re Grove Street*, 61 Cal. 438; *Humboldt County v. Dinsmore*, 75 Cal. 604, 17 Pac. 710; *Hill v. Board of Supervisors*,

95 Cal. 239, 30 Pac. 385; *People v. Reclamation District*, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085; *Lingo v. Burford*, 112 Mo. 149, 20 S. W. 459; *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. 656; *Scotten v. City of Detroit*, 106 Mich. 564, 64 N. W. 579; *Porter v. Stout*, 73 Ind. 3; *Ryder v. Horsting*, 130 Ind. 104, 29 N. E. 567, 16 L. R. A. 186; *Chicago etc. R. Co. v. Sutton*, 130 Ind. 405, 30 N. E. 291; *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525; *McClelland v. Miller*, 28 Ohio St. 488.

The above authorities also establish the doctrine that, when jurisdiction has once been acquired under a proper petition and notice, the subsequent proceedings being presumed regular cannot be collaterally attacked. The trial court committed no error in rejecting the evidence offered for the purpose of showing that the petitioners were not householders.

Sections 3774 to 3779, inclusive, Bal. Code, being §§ 4 to 9, inclusive, of chapter 50, Session Laws of 1895, were amended by chapter 96, Session Laws of 1901, page 200. A comparison of the amended with the original sections will show that the principal change consisted in providing that the county surveyor should perform all the duties theretofore required of viewers. It is apparent from the amended act of 1901 that the legislature intended to dispense with the appointment of viewers. It however failed to amend §§ 3781 and 3782, Bal. Code (P. C. §§ 7830, 7831), being §§ 11 and 12 of the act of 1895, and such sections still provide for the giving of notice, and for further proceedings by the county commissioners, *on the report of the viewers*. But the previous § 3775, Bal. Code, providing for the appointment of viewers, having been repealed, no such appointment is now authorized. The county surveyor discharged all duties formerly required of the viewers, and made his report in due and legal form. As the relators had not waived damages, the commissioners caused notice to be personally served upon them that, at a time stated, the board would take up for hearing the *surveyor's* report on the petition, together with the petition. As § 3781,

Bal. Code, requires such notice to be given upon the report of the *viewers*, the relators contend the notice given was insufficient and conferred no jurisdiction over them or their property. In their brief they insist that it is impossible for the county under the present statutes to condemn any right of way for a county road; that the exact procedure provided by the statutes must be followed, and that no valid notice of hearing on the petition and the surveyor's report can now be given to owners who have not waived damages. We understand this to be the vital point upon which the relators rely for a reversal herein. In substance they contend, (1) that no viewers are authorized; (2) that notice must only be given on the report of viewers; (3) that, there being no such report for want of viewers, therefore no valid notice conferring jurisdiction can be served.

The amendments of 1901 indicate a legislative intent that the county surveyor shall perform all duties formerly delegated to viewers. The mere oversight or inadvertence of the legislature in failing to amend §§ 3781 and 3782, Bal. Code, did not result in a complete annihilation of the road law so that no condemnation could be had of lands belonging to owners who refused to waive damages. It was not the intention of the legislature by the act of 1901 to place it within the power of owners to prevent the establishment of a road by their mere refusal to waive damages. It is our duty to so construe the amended law as to preserve it and carry out the legislative intent. We therefore hold that the county commissioners acted with lawful authority when they served notices upon the relators of a hearing upon the petition and the report of the surveyor. As the law now stands the word "viewers," wherever it occurs, either in the statute or the road proceedings, must be interpreted as referring to the county surveyor. Such a construction is necessary to preserve the vitality and effectiveness of the entire statute and carry out the legislative intent. We hold the notice and its service on

the relators to have been valid, to have conferred jurisdiction, and to have been properly admitted in evidence.

This holding effectually disposes of all other assignments of error presented by the relators. We will, however, allude to their contention that the preliminary proceedings of the commissioners are void, for the reason that it does not affirmatively appear that they by order declared the amount of damages awarded to relators, or that they ordered the amount of such damages to be set apart in the treasury out of the proper fund to be paid to the relators, or that they determined the amount of damages which in their judgment should be tendered to the relators. Damages were actually tendered by the commissioners and were refused by the relators. This being true, we cannot, in this collateral proceeding, review the action of the county commissioners in the matter of awarding or ascertaining damages. Such review, if had at all, must be obtained by some direct procedure. All jurisdictional matters were pleaded and shown in the superior court. The only question it was called upon to decide was, whether the proposed use of the relators' land was public. As it appears that the land is to be appropriated for a county road, it necessarily follows that the only judgment which the superior court could have rendered was the one entered. The appropriation of private property for a highway is necessarily for a public use. *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1, 69 Pac. 366; *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 Pac. 256.

We fail to find that the honorable trial judge has committed any prejudicial error. The judgment is affirmed, and the stay of proceedings heretofore granted by this court will be vacated upon the filing of this opinion.

Root, Fullerton, and Mount, JJ., concur.

[No. 6621. Decided August 5, 1907.]

MARTIN WHITE, *Respondent*, v. HUGH McSORLEY *et al.*, *Appellants*.[1]

QUIETING TITLE—PRIMA FACIE CASE. In an action to quiet title, a plaintiff in possession under record title is entitled to judgment unless the defendant's evidence overcomes or avoids such title.

VENDOR AND PURCHASER—BONA FIDES—RIGHTS AS TO THIRD PERSONS. A purchaser from the record owner, for value and in good faith, without notice of an agreement that the record owner held title as security only, takes an absolute title in fee.

EXECUTION—SALES—TITLE OF PURCHASER—QUIETING TITLE—PERSONS ENTITLED. An execution plaintiff who levies upon and purchases real property which his debtor had previously conveyed by an absolute deed, intended as security, but with power of sale, acquires no greater right than his debtor had; viz., the right of redemption or the right to the surplus after a sale; and therefore an innocent purchaser for value, from the party holding the record title, may maintain an action to quiet his title as against such an execution sale, under Bal. Code, § 5500.

APPEAL—DECISION—QUIETING TITLE—LIENS FOR TAXES PAID. The supreme court will not reverse a judgment quieting title in the plaintiff, on the ground that defendant was not allowed a lien for taxes or assessments paid, where that issue was not raised in the pleadings, as the liens can still be enforced against the property.

Appeal from a judgment of the superior court for King county, Morris, J., entered October 24, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Willett & Willett, for appellants.

Aust & Terhune, for respondent.

MOUNT, J.—This action was brought by the respondent to quiet title to lots 15 and 17, of block 72, Gilman Park Addition to Seattle, now Ballard. The answer of McSorley and wife alleged title in themselves. At the trial of the case, the

[1]Reported in 91 Pac. 243.

court found that the title was in the plaintiff, and made findings to that effect and entered a decree quieting title in the plaintiff. The defendants have appealed.

The undisputed facts show that, on May 31, 1901, the title to lot 15 was in S. D. Crockett and wife. On that day Crockett and wife executed a deed of the lot to Maggie Donald. This deed was placed in escrow, to be delivered upon the payment of $300, in monthly payments. Mrs. Donald made one or two payments, and then arranged with one Jacob Reichold to complete the payments for her. This was done, and after Mr. Reichold had made the payments, the escrow deed was delivered to him. After the payments were all made, there was due Mr. Reichold from Maggie Donald the sum of $300, which she was unable to pay. She and her husband thereupon, on July 8, 1902, deeded the lot to Mr. Reichold, with the verbal understanding that, if the amount due him was not paid within one year, he was to sell the lot and, after deducting the amount due him, with interest, he was to deliver the balance, if any, to Mrs. Donald. Nothing thereafter was paid to Reichold, and on August 7, 1903, Reichold sold and conveyed the lot by warranty deed to respondent, for the sum of $358. In the meantime, on March 27, 1903, the appellants began an action against Thomas Donald and wife, and attached the lot, which was afterwards sold on execution and bid in by the appellants. As to lot 17, the facts are that, prior to July 21, 1902, the title stood in the heirs and devisees of Albert Nelson, deceased. On that day those heirs and devisees conveyed the lot to M. A. Emery, who on the same day agreed to sell the lot to Maggie Donald, and some money was paid on the sale; but the money was within a short time afterwards returned, and the sale was not completed. Thereafter, in March, 1905, M. A. Emery and her husband sold and conveyed the lot to the respondent. In the meantime, on March 27, 1903, this lot was attached and sold in the same action and manner as lot 15, as stated above. There are other facts in the case, but they tend only to show that

the Donalds had parted with all claim to the lots prior to the levy of the attachment named. With the view we have taken of the case, such facts need not be stated, as they tend only to confuse the principal issue. The appellants claim through the attachment and execution sale above stated.

It will be readily seen that the Donalds had no record title to the lots at the time of the attachments. It is argued by appellants, as against the judgment to quiet title in the respondent, that the deed of lot 15 from the Donalds to Reichold, and the deed of lot 17 to M. A. Emery, were security for debts and therefore mortgages, and that in this state a mortgage is a mere lien and does not pass title. It is no doubt true that a mortgage in form is a mere lien in this state and does not pass title. But the statute provides, at Bal. Code, § 5500 (P. C. § 1142), that any person, having a valid, subsisting interest in real property and a right to the possession thereof, may recover the same by action, and may have judgment in such action quieting plaintiff's title. Under this section a person holding the legal title to the real estate with the right of possession may maintain an action to quiet his title. In this case there is no dispute that the legal record title is in the plaintiff, and there is apparently no dispute that plaintiff is entitled to possession, the lots being vacant, provided his record title is valid. The appellants claimed in the answer that the title was conveyed to the respondent without consideration and in fraud of the appellants. There was no evidence to support the allegations of fraud. Appellants now claim, under the evidence, that the deed of lot 15 from the Donalds to Reichold and the deed to Emery were mere mortgages to secure a debt. In either case, where it appears or was admitted that the plaintiff was the holder of the record legal title and entitled to the possession, it then devolved upon the defendants to avoid that title in some way, and plaintiff was entitled to a judgment quieting his title, unless the defendants overcome that title by showing the same was fraudulent or in some other way avoiding it.

The evidence undoubtedly shows that as to lot 15 the conveyance from the Donalds to Reichold, while absolute in form, was as to those two parties a mortgage with the power of sale in the grantee. The plaintiff purchased for value and in good faith, without notice of the agreement existing between the Donalds and Reichold. He therefore took an absolute title in fee. He knew of the attachment and sale thereon, and that the appellants were claiming some interest in the lots, but that interest was the interest of the Donalds alone, which interest after sale by Reichold was a mere right to whatever difference there was between the amount of the debt and the selling price. The evidence shows that the respondent was not actually informed of that interest, but was informed that the claim of the appellants amounted to nothing. At any rate, the appellants, when they sold the interest of the Donalds at execution sale and became the purchasers, acquired no greater interest in the lots than the Donalds had at that time (*Lee v. Wrixon*, 37 Wash. 47, 79 Pac. 489, and authorities there cited), which was merely the right to redeem; or, in case of sale by Reichold, the right to an accounting for the balance due after the debt was paid. The appellants could, therefore, no more maintain an action to quiet title in themselves than the Donalds could have done had the attachment and execution sale not taken place. It is not and cannot reasonably be claimed that the Donalds could maintain such an action against the respondent. As to lot 17, it does not appear that the Donalds had any claim whatever to that lot at the time of the attachment sale, and therefore appellants acquired no interest therein.

Appellants claim further that they have paid some taxes and street assessments against the property, and that they should be reimbursed therefor. They made no claim for such items in their answer and no issue was made thereon at the trial. There is some rather indefinite evidence to the effect that appellants paid certain amounts for street assessments. There is not enough evidence of such facts, however, to war-

rant a reversal of the case on that account. No doubt the respondent should reimburse the appellants for assessments paid, but inasmuch as that issue was not raised by the pleadings or at the trial, and as the same may still be enforced as a lien against the lots, we shall make no order thereon.

The judgment appealed from is therefore affirmed.

HADLEY, C. J., FULLERTON, CROW, and ROOT, JJ., concur.

[No. 6773. Decided August 5, 1907.]

THE CITY OF SEATTLE, *Respondent*, v. PUGET SOUND IMPROVEMENT COMPANY, *Appellant*.[1]

INDEMNITY — NEGLIGENCE — MUNICIPAL CORPORATIONS — RECOVERY OVER BY CITY—JUDGMENT—CONCLUSIVENESS. Where trapdoors are negligently maintained in a sidewalk by the abutting owner, whereby a pedestrian is injured, the city and the owner are not *in pari delicto* or joint wrongdoers as between each other; and upon recovery of judgment against the city in an action for the injuries, and payment of the same, the city has a remedy over against the lot owner for the amount paid on the judgment, which is conclusive on the lot owner if due notice to defend the action was given.

NEGLIGENCE — DANGEROUS PREMISES — LEASE — PARTIES LIABLE — OPENING IN SIDEWALK. The owner of a building is liable for negligence in maintaining trapdoors over an areaway, placed in the sidewalk exclusively for the benefit of the building, where the building was in his control, although parts of it were leased to other parties.

Appeal from a judgment of the superior court for King county, Morris, J., entered November 21, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover over from a lot owner the amount paid on a judgment for injuries resulting from a defective sidewalk. Affirmed.

[1]Reported in 91 Pac. 255.

Bausman & Kelleher, Peters & Powell, and *R. P. Oldham,* for appellant.

Scott Calhoun and *Elmer E. Todd,* for respondent.

MOUNT, J.—This action was brought by the respondent to recover over from the appellant the amount of a judgment for personal injuries, recovered by C. S. Smith against the city, and paid by the city. The case was tried to the court without a jury, and a judgment was rendered against the appellant. The appellant alleges that the court erred in overruling a demurrer to the complaint and in making certain findings of fact. The material allegations of the complaint are as follows:

"That Second avenue is now, and was at all times herein mentioned a public street in said city of Seattle, being one of the principal streets in said city and a common thoroughfare, and as such was much used by the public; that at all times herein mentioned said defendant was the owner of lots 1 and 4, in block 6, of the plat of the town, now city, of Seattle, as laid off by C. D. Boren and A. A. Denny, in the county of King, state of Washington; that at all times herein mentioned there was situated on said lot a four-story brick building, known as the 'Boston Block,' and under the sidewalk on Second avenue, in front of said lots, particularly in front of that store building in said block known as No. 722, Second avenue, in said city, said defendant maintained an areaway, and at or near said store building in said sidewalk maintained a trapdoor down into said areaway and cellar, beneath said sidewalk; that on the night of the 19th of October, 1901, and for many months prior thereto, the defendant had negligently and carelessly maintained said trapdoor in said sidewalk, as aforesaid; that said trapdoor, which was made of iron, was unlawfully and dangerously raised above the surface of the adjoining sidewalk from a height of from two to three inches; that said opening in the sidewalk was covered, as aforesaid, by iron trapdoors, which met over the middle of said opening; that at said point of meeting, one of said iron doors projects above the other, and said iron doors had become on the surface worn smooth, and at all times were slippery and dangerous to life and to travelers using the same in walking over said sidewalk

in the ordinary and usual manner; that said defendant carelessly and negligently failed to place any danger signals as a warning around or about said defective place in said street and sidewalk and said obstruction therein contained; that on the night of said 19th of October, 1901, one Christina D. Smith, while lawfully traveling along said Second avenue at or near No. 722, Second avenue, stumbled on said iron doors, and the same then and there being slippery, stumbled, slipped and fell, and was thereby thrown on said iron doors on said sidewalk and ground, and therefrom she sustained great and severe injuries."

Then follows allegations of the extent of the injuries to Mrs. Smith, and that she duly presented her claim to the city for damages.

"That thereafter, to wit, on or about the 11th day of February, 1902, said Christina D. Smith and Lee Smith, her husband, instituted an action in the superior court of King county, Washington, to recover damages against the city of Seattle on account of said injuries so received as aforesaid, which cause is numbered 34982 in the files of said court; that said city of Seattle duly defended against said action and issues were joined therein, and a trial was had upon said issues in said court on January 29th, 1903, resulting in a verdict in favor of said Christina D. Smith and her husband in the sum of $7,633.00; that said city of Seattle duly filed its motion for a new trial, which said motion was denied by the court, and judgment entered upon said verdict in the sum of $7,633.00 and costs against said city; that from said judgment the city of Seattle duly appealed to the supreme court of the state of Washington, and, thereafter, the supreme court of the state of Washington affirmed said judgment of the superior court, with costs; that thereafter, on the 23d day of December, 1903, the remittitur from the supreme court affirming said judgment was filed in the office of the clerk of said superior court and final judgment was entered against said city of Seattle for $7,633.00, and costs amounting to $180.15; that on said 23d day of December, 1903, the city of Seattle was forced to and did pay said judgment, with interests and costs, amounting in the aggregate to $8,151.91; that in addition thereto, said city of Seattle was forced to and did expend

as necessary expense in defending said suit in prosecuting said appeal the sum of $500."

Then follows an allegation of notice to the appellant to defend the suit.

Upon the sufficiency of this complaint, the appellant argues that the complaint shows that the appellant and the city were joint tort feasors, and since there can be no indemnity by one joint tort feasor against another, there can be no recovery in this case. But as we read the allegations of the complaint, we find nothing in it to justify the conclusion that the city and the appellant were joint tort feasors. The allegations are, that the defendant maintained an areaway beneath the sidewalk, and trapdoors in the sidewalk; that the trapdoors were carelessly and negligently maintained by defendant and were unlawfully and dangerously raised above the surface of the sidewalk two or three inches; that said doors were worn smooth and slippery and were dangerous, and that defendant failed to protect against such dangers. These allegations are that the negligence was of the defendant, not of the city. It is true that it is the duty of the city to keep its streets reasonably safe, and if the trapdoors had been placed in the sidewalk by the city for the benefit of the city, it would alone be liable. But where the trapdoors were placed in the sidewalk by the defendant for its sole use and benefit, it was the duty of the defendant to properly and safely place and maintain them. The defendant's negligence in regard thereto would be construed as the city's negligence with reference to third persons who might be injured thereon, because of the duty of the city to keep the streets reasonably safe. But while the city would be liable to third persons on account of an injury occasioned thereby, it would not be a joint tort feasor with the defendant, because the acts of negligence are the wrongful acts of the defendant alone. The great weight of authority seems to hold that there can be a recovery over by a municipality where a street is rendered unsafe by the wrongful use of another, and where damages are recovered against the municipality

therefor. The rule is stated as follows in 2 Dillon on Municipal Corporations (4th ed.), at § 1035:

"If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose wrongful act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrong-doer, as between itself and the author of the nuisance, . . ."

In *Chicago v. Robbins*, 2 Black 418, 17 L. Ed. 298, the supreme court of the United States said:

"It is well settled that a municipal corporation having the exclusive care and control of the streets, is obliged to see that they are kept safe for the purpose of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault and has so used the streets as to produce the injury, unless it was also a wrong-doer."

See, also, *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427; *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, and note to this case in 40 Lawyer's Cooperative Edition 712.

In *McNaughton v. Elkhart*, 85 Ind. 384, the court said:

"It is well settled that when a town or city has been compelled to pay damages on account of excavations and obstructions in its streets, wrongfully made, or lawfully made and negligently left in a dangerous condition, it has a right of action over against the author or authors of the nuisance for the amount so paid; and that, if properly notified of the action, such person or persons are bound and concluded by the judgment recovered against the corporation, as to all questions adjudicated in such action."

In *Milford v. Holbrook*, 9 Allen 17, 85 Am. Dec. 735, where the town of Milford was compelled to pay a judgment on account of injuries received by one Day through the falling of an awning, the court, in sustaining a judgment over in

favor of the town against the person maintaining the awning, said:

"The plaintiffs were not *in pari delicto* with the defendant, and therefore the principle that one joint wrongdoer cannot have contribution against another has no pertinency. The only fault or negligence which could be imputed to the town, on the facts shown, was a failure to remedy the nuisance which the defendant has caused. This is no bar to their claim for indemnity."

In *Canandaigua v. Foster*, 156 N. Y. 354, 50 N. E. 971, 66 Am. St. 575, 41 L. R. A. 554, a judgment over in favor of the town was sustained. The court of appeals of New York said:

"But whoever, even by due permission, cuts a hole in the sidewalk for the benefit of his adjoining property must use reasonable care to protect the public from danger on account thereof. Reasonable care requires that he should provide a proper covering, inspect it from time to time, and repair it when necessary, as otherwise passersby, for whose benefit the sidewalk is maintained, may be injured."

Measured by these rules the complaint was sufficient.

Appellant also contends that the court erred in finding that the appellant maintained the trapdoors and areaway beneath the sidewalk, and that appellant had control thereof. It is admitted that the appellant owned the building, and that the areaway and trapdoors were placed in the sidewalk exclusively for the benefit of the building. Under these circumstances it became the duty of the appellant to maintain the trapdoors reasonably safe for passersby. The evidence conclusively shows that the building was at all times under the control of the appellant. It is true the appellant leased offices and storerooms therein to different tenants, but the control of the building and its maintenance and the actual possession of a part of the building were in the appellant personally at all times. Under these circumstances appellant would be liable. As re-

lating to both these points, the rule is well stated in *Canandaigua v. Foster, supra,* as follows:

"While the owner cannot be held liable in this action for failing to repair the entire sidewalk in front of his premises, was he properly held liable for failing to keep in repair the grate itself, which was his own structure? This depends upon the duty that he assumed when he cut a hole in the sidewalk and covered it with the grate. That duty included proper construction in the first place, and reasonable care on the part of the owner to keep the grate in repair thereafter, as long as he continued in possession. The duty sprang from the necessity of having safe sidewalks, and as the necessity is continuous, so is the duty. Upon no other ground can the construction of a grate in a sidewalk, which is an interference with a public highway, be justified, even when permission is duly granted. Upon the transfer of the entire interest and possession to another, as the duty runs with the land, it would be cast upon the grantee. So a lease of the entire premises and possession thereof by the tenant, would doubtless throw the burden upon the latter. (Shearman & Redfield on Negligence [5th ed.] §§ 710, 713.) The conveyance of an undivided interest, however, would not have that effect, and the demise of a part of the premises should not. The obligation goes with the land and cannot be discharged by a partial alienation of the land, at least, unless the alienation, if for a fixed term, carries with it the exclusive possession of the premises for that term. Entire possession by a tenant from foundation to roof doubtless involves the duty of keeping a grate in front of the premises in repair, which otherwise rests on the owner of the fee. But whoever, even by due permission, cuts a hole in the sidewalk for the benefit of his adjoining property must use reasonable care to protect the public from danger on account thereof. Reasonable care requires that he should provide a proper covering, inspect it from time to time and repair it when necessary as otherwise passersby, for whose benefit the sidewalk is maintained, may be injured. If he parts with the premises, or parts with the possession thereof for a period, the burden falls on his successor in title or possession. If he transfers either title or possession, in part only, he does not escape the burden. The implied duty assumed when the hole was cut and the grate placed over it requires reasonable precaution on the part of the owner to protect the public as long as he remains

the owner and is in possession of any part of the building on the abutting land. He cannot cast the burden of maintenance on the public any more than he could have cast upon them the burden of original construction, for the grate is wholly for the benefit of his property. Nor can he relieve himself of the duty without parting with the entire possession of the property benefited, for the safety of the public requires that the owner, as long as he is in possession of any part of the property, should be compelled to keep his structure in the sidewalk in suitable condition for use as a part of the sidewalk. As the duty is imposed by law for the public safety, its extent is measured by whatever public safety requires. Anything less than the alienation of the entire property, either permanently as by deed, or temporarily, as by lease, would leave the public without adequate protection. A person injured by a defective grate should not be subject to the hazard of ascertaining the precise relation existing between the owner and one of his tenants with reference to the control of the grate, but a simple rule, resting upon ownership and possession, in whole or in part, of the adjacent structure, is required by sound public policy."

See, also, *Chicago v. Robbins, supra; Milford v. Holbrook, supra; Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

We find no error in the record. The judgment is therefore affirmed.

HADLEY, C. J., FULLERTON, CROW, and ROOT, JJ., concur.

[No. 6771. Decided August 17, 1907.]

JOHNSON COUNTY SAVINGS BANK, *Appellant*, v. VICTOR A. RAPP *et al.*, *Respondents*.[1]

BILLS AND NOTES—TRANSFERS—BONA FIDE PURCHASER—EVIDENCE—SUFFICIENCY. In an action to recover on drafts, plaintiff claiming to be a purchaser without notice of failure of consideration by reason of fraud in the sale of jewelry for which the drafts were payment, there is sufficient evidence to sustain a verdict for defendants, where it appears that the goods were worthless, the sale fraudulent, and little better than obtaining money under false pretenses; that the president of the plaintiff, a bank at the home of the vendor, knew of the nature of the business, had purchased many similar drafts and had much litigation over the same by reason of failure of consideration, and his testimony leaves doubt as to whether there was any actual purchase of the drafts by the bank.

EVIDENCE — PAROL — SALES — FAILURE OF CONSIDERATION. In an action upon drafts given in payment of the purchase price of goods on a sale evidenced by an obscure order taken by a traveling salesman, evidence of the representations made by the salesman in making the sale is admissible upon an issue as to failure of consideration and fraud.

BILLS AND NOTES — BONA FIDE PURCHASER — EVIDENCE — SIMILAR TRANSACTIONS. Upon an issue as to whether a bank was a *bona fide* purchaser of a draft taken from one of its customers on a fraudulent sale of goods, evidence as to similar transactions with the bank, resulting in like litigation, is admissible to show the knowledge of the bank as to the character of the paper.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered October 30, 1906, upon the verdict of a jury rendered in favor of the defendants, in an action by the purchaser of drafts to enforce payment against the drawees. Affirmed.

A. E. Russell, for appellant.

Danson & Williams, for respondents.

FULLERTON, J.—The appellant is a banking corporation doing business at Iowa City, in the state of Iowa. The re-

[1]Reported in 91 Pac. 382.

spondents are merchants doing business in this state. In the summer of 1904 the Puritan Manufacturing Company of Iowa City, Iowa, contracted to sell and deliver to the respondents certain jewelry, at the agreed price of $254, to be paid for in four quarterly payments of $63.25 each, "if the purchaser gives his four acceptances, each for one quarter of the amount, to close the account, within ten days from the date of delivery; otherwise terms are net cash 15 days, 6 per cent discount cash 10 days." The sale was made by the Puritan Manufacturing Company's traveling salesman. On the receipt of the order given the salesman by the respondents, the jewelry company shipped them certain jewelry, and at the same time drew upon them four drafts payable according to the terms of the contract of sale above quoted. These the respondents accepted on August 3, 1904. On September 30 thereafter, the Puritan Manufacturing Company endorsed them and delivered them to the appellant. The drafts were not paid at maturity, and this action was brought to recover thereon. The respondents defended on the ground that the jewelry shipped them was not as warranted by the jewelry company, and was utterly worthless for any purposes for which they could use it, and that there was for that reason no consideration for the drafts. The appellant claimed to be a purchaser of the paper for value, before maturity, and without notice of any defect therein. On these issues a trial was had to a jury, resulting in a verdict and judgment for the respondents.

It is first assigned that the court erred in refusing to sustain the appellant's challenge to the sufficiency of the evidence; it being contended that the respondent's evidence was insufficient to constitute a defense. But we think the court properly submitted the matter to the jury. On the question of the value of the goods, the respondents testified that they were not as represented, and that all they were able to sell of them were returned by the purchasers after a short time because of their inferior quality; and other witnesses, called as experts in the

jewelry line, testified that the goods were worthless for the purposes of legitimate trade. On the question of the knowledge of the appellant of this failure of consideration, the evidence is not so direct, still we think it sufficient to sustain the verdict. While it is true the president of the appellant bank did testify, in his examination in chief, that the bank purchased the drafts after they had been duly accepted by the respondents, without notice or knowledge on his part of any defects therein, yet on cross-examination he admitted that he knew the character of the business the drawer of the drafts was engaged in, that the bank had purchased large quantities of their paper, and had had a number of lawsuits over it where the defense was failure of consideration. His evidence, moreover, leaves a doubt whether there was any actual purchase of the paper—whether the pretended purchase was not rather a scheme to aid the seller of the goods than an engagement in ordinary trade. When, in connection with this, it is remembered that the business of the seller was hardly legitimate—that it was in fact little better than obtaining money by false pretenses—it is rather too much to say there is no evidence from which the jury could rightfully draw the conclusion that the bank official did not testify truthfully in his direct statement. The evidence was sufficient to go to the jury and the challenge was properly denied.

It is next assigned that the court erred in admitting, over the objection of the appellant, evidence relating to the representations of the traveling salesman of the Puritan Manufacturing Company. But this was a necessary part of the respondent's case. They were obligated to show the condition on which they purchased the goods in order to show a failure of consideration. This evidence was directly in point for that purpose. The written order which the appellant urges represents the entire contract was at best obscure, and subject to interpretation. The interpretation put thereon by the salesman to induce a sale could be properly put in evidence to show a failure of consideration.

The testimony of the witness Hoyt as to a similar transaction with the appellant bank was admissible as tending to show knowledge on the part of the bank of the character of the paper they were purchasing from the Puritan Manufacturing Company.

The judgment appealed from is affirmed.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

[No. 6644. Decided August 27, 1907.]

C. J. ERICKSON, *Appellant*, v. FERDINAND HOCHBRUNE, *Respondent*.[1]

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence by a trial judge who saw and heard the witnesses will not be disturbed on appeal.

ESTOPPEL—BY ACQUIESCENCE—EVIDENCE—SUFFICIENCY—WORK AND LABOR—IMPLIED CONTRACT. The evidence is not sufficient to show an estoppel to deny an implied contract to pay for grading a lot, where the lot owner refused to enter into a written contract therefor with the party doing the grading, who was a contractor needing the dirt removed, and it appears that the owner notified him on several occasions to cease trespassing on the lot.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 31, 1906, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to foreclose a lien for grading. Affirmed.

Shank & Smith, for appellant.

Kerr & McCord, for respondent.

PER CURIAM.—Action by C. J. Erickson, plaintiff, against Ferdinand Hochbrune, to foreclose a lien on lot 7, block 44, A. A. Denny's Addition to the city of Seattle. The plaintiff

[1]Reported in 91 Pac. 485.

alleges that, under an oral contract, he performed work and labor of the value of $1,745.26 in grading the lot by removing dirt therefrom; that no payment had been made therefor; and that he had, by filing notice, perfected a lien on the lot. The defendant, after admitting his ownership of the lot, denied all other allegations of the complaint. The trial court found, that the plaintiff without authority, and against defendant's consent, entered upon the lot and removed dirt therefrom; that the defendant frequently warned him to keep off; that the defendant never entered into any contract for the removal of any dirt; and that plaintiff was a trespasser. From a judgment in favor of the defendant, the plaintiff has appealed.

The only question on this appeal is whether the findings are sustained by the evidence. Although some conflict exists, we are unable to conclude from all the evidence that the findings are not sustained. As the preponderance of the evidence seems to be with the defendant, we cannot disturb the findings made by the trial judge who saw the witnesses and was in a position to determine their credibility

The appellant contends that, even though it be conceded that the respondent did notify him to keep away from the lot and cease work thereon, such notice was not given until after three-fourths of the grading had been done; that respondent had theretofore knowingly permitted him to almost complete the work; and that he should now be estopped from denying an implied contract for the work or his obligation to pay. Were appellant's statement in this regard clearly sustained by the preponderance of the evidence, his contention would not be without merit. While it is true that the respondent, on two occasions, in the presence of witnesses, notified appellant to keep away from the lot and cease work, after a large percentage of the grading had been done, the testimony of the respondent shows that he himself, at other and previous times, had given like notices to appellant. There is evidence which, although rather indefinite, tends to show

that appellant, who was doing large amounts of grading on the streets and other property abutting respondent's lot, needed the dirt being removed, which he was selling to third parties. It also appears that, while it was his custom to obtain written contracts for grading done by him, he had failed to secure any written contract from respondent, although he had attempted to do so. Taking all surrounding circumstances into consideration, and having due regard to the weight of the evidence, we are unable to find any estoppel against the defendant, or that the trial court erred in the findings made.

The judgment is affirmed.

[No. 6200. Decided September 5, 1907.]

THE STATE OF WASHINGTON, *on the Relation of M. L. Clifford, Appellant*, v. THE SUPERIOR COURT FOR PIERCE COUNTY *et al., Respondents.*[1]

CERTIORARI—CESSATION OF CONTROVERSY. Certiorari to review an order respecting a commission to take testimony in a pending cause will be dismissed, where, before the hearing in the supreme court, the action has been dismissed.

Certiorari to review a judgment of the superior court for Pierce county, Huston, J., entered June 26, 1906, dismissing an application to compel a witness to produce documents and answer interrogatories. Dismissed.

R. F. Laffoon, for appellant.

G. C. Israel, for respondents.

PER CURIAM.—A commission, with interrogatories annexed, to take the deposition of a witness, was issued by the district court of the district of Alaska, division No. 1, at Juneau,

[1]Reported in 91 Pac. 568.

Alaska. The cause wherein the commission issued was then pending in said court, and the witness whose testimony was sought was the plaintiff in the action, and resided in Pierce county, Washington. The commission was directed to M. L. Clifford, a notary public, residing in Pierce county. Upon receipt of the commission, the commissioner attempted to take the testimony of the witness, and it is claimed that the witness refused to honor a subpoena *duces tecum* to produce certain letters and documents, and refused to answer certain interrogatories propounded to him. The commissioner thereupon applied to the superior court of Pierce county for an order requiring the witness to show cause why he should not be compelled, by order of said court, to produce the documents and answer the interrogatories aforesaid. An order to show cause was issued, and upon return thereto, the court held that it was without jurisdiction to make any order in the premises, and dismissed the petition.

Application was then made by the commissioner to this court for a writ of review to review the action of the superior court. During the pendency of the proceeding before this court, a certificate from the said district court for the district of Alaska has been filed here, showing that the original cause in which the commission to take the deposition was issued was, by that court, dismissed without prejudice, on the 8th day of January, 1907. The relator, in an affidavit filed, does not controvert the fact of dismissal, but asserts that the testimony should still be taken to preserve it for future use in any action that may be brought concerning the same subject-matter. Inasmuch as the action in which the commission to take testimony was issued has been discontinued, we think it should be held here that the controversy presented by the relator's application here has ceased. The relator's petition is therefore dismissed.

[No. 6602. Decided September 5, 1907.]

B. L. Muir, *Respondent*, v. E. F. Beck *et al.*, *Appellants*.[1]

Specific Performance—Accounting—Evidence—Sufficiency. In an action for specific performance and an accounting, findings in favor of the plaintiff are sustained by the evidence when it appears that the defendant admitted the account, except as to $150, and there was evidence that he did receive such sum, and that such payment constituted full performance of the contract by plaintiff.

Appeal from a judgment of the superior court for King county, Hatch, J., entered September 27, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for an accounting and specific performance. Affirmed.

Gray & Stern (*James A. Snoddy*, of counsel), for appellants.

Vince H. Faben, for respondent.

Crow, J.—On or about March 6th, 1905, the defendants E. F. Beck and Mary A. Beck, his wife, who had recently purchased block 72, Burke's Second Addition to Seattle, for $3,600, entered into a written contract with the plaintiff, B. L. Muir, which in substance provided, that the property should be subdivided into lots, to be sold by the plaintiff Muir at not less than agreed minimum prices; that abstracts of title were to be furnished by the defendants Beck and wife, at a cost of not more than $5 per lot; that the expense of subdivision, surveying, platting, and clearing, not to exceed $45, should also be paid by Beck and wife; that the plaintiff Muir was to receive a commission of five per cent on all sales made by him; that, if within six months plaintiff had sold lots for cash and on time to the total value of $5,500 over and above his commission, then all lots remaining unsold were to be

[1]Reported in 91 Pac. 552.

conveyed to him by the defendants Beck and wife, as additional compensation for his services. The plaintiff, claiming to have sold the required number of lots, commenced this action to compel the defendants to convey to him all lots not sold, and for an accounting for the proceeds of certain lots which he alleged the defendants had wrongfully sold after the expiration of the six months, and after the plaintiff's completion of the contract. The trial court made findings and entered a decree in favor of the plaintiff. The defendants have appealed.

Several assignments of error are made, but the appellant's principal contention is that sufficient lots were not sold within the six months to net them $5,500, over and above respondent's commission. The trial court found that such sales had been made. After considering all the evidence and making careful computations based thereon, we conclude that this finding is correct. The substantial dispute between the parties was, whether a certain sale of three lots, made by the respondent Muir to one Choput, was for $1,300, as contended by respondent, or only $1,150 as contended by appellant. The court correctly found it to have been for $1,300. In fact, the appellant E. F. Beck admitted that he had executed a contract of sale, and afterwards a deed, to Choput expressing $1,300 consideration. The cost of grading, $45, and the cost of abstracts, $96, being a total of $141, should have been paid by appellants, but were in fact paid by respondent. Respondent is therefore entitled to a credit therefor against the $5,500. This would leave $5,351 as the net sum due appellants under the contract for sales made within the six months. Appellant's testimony caused the trial court to interrupt him on two or three occasions, and correctly suggest that his statements resolved the issues of fact in favor of respondent. Thereupon, appellant would always urge some mistake or misunderstanding. He was granted time to make final computations, and after doing so, testified, without making any detailed statement, that he had received in money and time con-

tracts, for all sales made by respondent, within the six months, the total sum of $5,270. But he never admitted having received the extra $150 on the Choput sale, which he did in fact receive. If this $150, the $45 for grading, and $96 for abstracts, be added to the $5,270 admitted by him, there would be a total of $5,561 to be charged against him on sales made by respondent within six months from the date of the contract, which more than constituted performance by respondent.

Other assignments of error are made, such as wrongful exclusion of evidence, incorrect amount of recovery, and improper form of judgment, all of which, after careful consideration, we conclude are without merit. Substantial justice has been done by the final decree entered, which is accordingly affirmed.

HADLEY, C. J., MOUNT, FULLERTON, and RUDKIN, JJ., concur.

[No. 6759. Decided September 5, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Ed. E. Hardin et al., Respondents*, v. E. J. GROVER, *Appellant*.[1]

ATTORNEY AND CLIENT — DISBARMENT — JURISDICTION — GROUNDS. The state courts have jurisdiction to disbar an attorney for the solicitation of money for the purpose of bribing a referee in bankruptcy, appointed by the United States court, as it directly involves the attorney's integrity and professional conduct, and it is immaterial in what court the act was committed.

SAME—TRIAL—FINDINGS—SEPARATION. In proceedings in disbarment of an attorney founded on two distinct charges, findings stated as if the charge contained but one specification are sufficient, as the law does not require findings to be separated as to distinct causes of action.

[1]Reported in 91 Pac. 564.

Appeal from a judgment of the superior court for Whatcom county, Frater, J., entered April 18, 1907, disbarring an attorney from practicing for a term of two years, after a trial on the merits. Affirmed.

Healy & Slentz and *McCafferty, Bell & Godfrey*, for appellant.

Ed. E. Hardin, H. M. White, and *Lin H. Hadley*, for respondents.

PER CURIAM.—This is a proceeding in disbarment brought against E. J. Grover, a practicing attorney of this state, by the respondents, who are also practicing attorneys of this state and members and representatives of the Whatcom County Bar Association. Specific charges of unprofessional conduct were made in writing, filed in the superior court, and a citation issued to the appellant requiring him to appear and show cause, on a day named therein, why he should not be disbarred from further practice as an attorney at law. The appellant appeared, and put in issue the allegations of misconduct charged against him, and also set up new matter by way of an affirmative defense. A reply was filed denying the new matter alleged, and on the issues thus made, a trial was had, resulting in a judgment disbarring the appellant from practicing his profession for a term of two years. This appeal is from that judgment.

The appellant first assigns error on the ruling of the court refusing to dismiss the proceeding for want of jurisdiction. This assignment is based on the fact that the acts of misconduct charged against the respondent related to his conduct with reference to certain claims against a bankrupt, whose estate was then pending before a referee in bankruptcy appointed by the district court of the United States for the Western District of Washington; the charges being that the appellant had solicited and collected money from his clients under the pretense that the same was needed for the purpose

of bribing the referee in order to induce him to render a favorable decision on the client's claim. It is argued that this is in the nature of a contempt to the referee in bankruptcy, and consequently the only court authorized to punish the offense was the district court of the United States by which the referee in bankruptcy was appointed.

But this contention mistakes the nature of the offense. The offense committed by the appellant was not a contempt committed before the referee in bankruptcy. It was in the nature of a substantive offense, directly involving his integrity and professional honor and his fitness to practice as an attorney at law. Any court, the bar of which the delinquent is a member, has jurisdiction to disbar for unprofessional conduct, when and wherever committed, whether the unprofessional conduct relates to matters occurring in court or to a purely private and personal transaction between the attorney and his client, and the superior court in this instance had jurisdiction.

The petition for disbarment contained two distinct charges or specifications. In making its findings the trial court did not make these the subject of distinct findings, but found the facts as if the charge contained but one specification, numbering the findings seriatum from 1 to 14. It is argued that this is fatal to the validity of the judgment, as the findings on the different specifications should have been separate, distinct, and independent, inasmuch as the charges were separate, distinct and independent. But there is no rule of law or practice that requires the findings to be different than they were made by the court. The code, of course, requires different causes of action, when united in one complaint, to be separately stated. [Bal. Code, § 4942 (P. C. § 412)], but there is no such requirement with reference to findings of fact. These are sufficient when given in writing and separately stated from the conclusions of law [Id § 5029 (P. C. § 645)], and this latter requirement was complied with by the trial court.

Finally, it is contended that the evidence does not justify the findings of fact. But while a large space in both briefs

is devoted to an argument of this question, we do not feel that a discussion of it here would serve any useful purpose. We have already indicated the nature of the charges, and it is sufficient to say that a careful examination of the testimony convinces us they were substantially proven. The judgment appealed from must be affirmed, and it is so ordered.

[No. 6781. Decided September 5, 1907.]

In Re Western Avenue.

The City of Seattle, *Respondent*, v. Puget Sound Improvement Company *et al.*, *Appellants*.[1]

Municipal Corporations—Improvements—Assessment of Benefits—Method of Assessment. An assessment of benefits, to be made according to benefits received, is not erroneous from the fact that the commissioners considered the value of the respective lots, and assessed some of them higher than others in the same vicinity, the percentage of benefit upon the values being the same, where that was only one of the elements taken into consideration in estimating the benefits, and where it is not shown that the lots in question were assessed more than they were benefited and more than their proportionate share of the cost of the improvement.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 12, 1906, confirming an assessment roll for local improvements, after a hearing on the merits upon objections of property owners. Affirmed.

Peters & Powell and *Harold Preston*, for appellants.

Scott Calhoun and *Elmer E. Todd*, for respondent.

Per Curiam.—The city of Seattle established a street between Virginia and Pike streets, in that city, calling the same Pike Place. The cost of the improvement was $125,000. The statutory board of commissioners was appointed by the court to assess the costs of the improvement upon the property bene-

[1]Reported in 91 Pac. 548.

fited. The commissioners charged to the city at large $15,000, and apportioned the balance upon private property, making return thereof as required by the order appointing them. At the hearing had on this return, a number of property owners appeared and objected to the assessment made against their respective properties, contending, among other things, (1) that it was not made in accordance with benefits, but in proportion to its market value; and (2) that the assessments, as made against their respective properties, greatly exceed the benefits conferred. The trial court heard evidence on the objections, found therefrom that they were not well founded, and confirmed the roll. The objectors named in the title appeal, and assign as error the ruling of the court on the objections above cited.

With reference to the first objection, commissioner Wateman did testify that one of the elements taken into consideration in estimating benefits was the value of the particular lot under consideration, and he pointed out that the reason why certain lots were assessed in excess of certain others lying in the same vicinity was because they exceeded in value the others; the excess in the amount of the assessment being due to the excess of value of the one over the other, the percentage of benefit being the same in each case. The appellants argue that this is assessing according to market value, and not according to benefits, the manner contemplated by the statute. We do not think, however, that this is a just criticism of the action of the commissioners. As we understand the evidence, the assessment was not based entirely upon values—that is, the commissioners did not merely make an estimate of the values of the different lots thought by them to be benefited by the improvement, and then apportion the charge among the lots on a percentage basis—but we understand that value was only one of the elements taken into consideration in estimating benefits; that they not only considered this, but considered all such other elements as appeared to them to enter into the question. There can be no valid objection to this method of proceeding,

as certainly the value of a given tract is proper to be taken into consideration with other elements in determining what proportion of an assessment such tract shall bear. But if this were not so, the question would not be very material. The commissioners are chargeable with the result of their work, and not with the manner by which they arrive at that result. If the return itself does not show that the premises of the objector are assessed more than they are benefited, and more than their proportionate share of the cost of the improvement, the objector is not injured, and hence it is of no moment to him what process the commissioners employed in order to arrive at the result reached by them.

On the question of the excessiveness of the assessment against the property of the objectors, we find the evidence irreconcilably conflicting. But after a painstaking examination of it, we are unable to say that the roll as returned is inequitable or unjust, or that the objectors' properties have been assessed more than they have been benefited, or more than their just proportion of the cost of the improvement.

The judgment confirming the assessment roll should be affirmed, and it is so ordered.

[No. 6707. Decided September 5, 1907.]

WILLAM A. SCHNEIDER, *Respondent*, v. GREAT NORTHERN RAILWAY COMPANY, *Appellant*.[1]

TRIAL—COMMENT OF JUDGE—RECEPTION OF EVIDENCE—WITNESSES—CREDIBILITY. It is unlawful comment for the trial judge, in overruling an objection to evidence, to remark that he did not consider it very material or entitled to much weight; and the same is prejudicial error where the same related to the intoxication of the plaintiff and affected the credibility of his evidence at the time in question, as to which there was a sharp conflict in the evidence.

CARRIERS—WRONGFUL EJECTION — DAMAGES — WITNESSES — CROSS-EXAMINATION. In an action for severe personal injuries sustained in the ejection of a passenger, where plaintiff testified that on the same afternoon he took railroad trips to another town, before consulting a physician, cross-examination as to the purpose of his trips is proper, as it bears upon the severity of the injuries.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered October 20, 1906, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for the wrongful ejection of a passenger from a railway train. Reversed.

M. J. Gordon and *Charles A. Murray*, for appellant.

A. G. Gray, for respondent.

FULLERTON, J.—The respondent, on July 3, 1906, being then a resident of Newport, Washington, purchased a round-trip ticket from that place to Sandpoint, Idaho. His purpose in going to Sandpoint was to attend a celebration of the national holiday. He reached Sandpoint sometime in the evening of the 3d, stayed there over the 4th, and started for home on an early train which passed through Sandpoint at about five o'clock on the morning of the 5th. He was somewhat late when he reached the station, and boarded the train with the

[1]Reported in 91 Pac. 565.

assistance of the brakeman, after it had started to move out. The conductor was taking tickets in the car into which the respondent entered, and took up the respondent's ticket without giving him a seat check in return. On reaching a seat, the respondent immediately went to sleep. When the train arrived at Priest River, a station between Sandpoint and Newport, the conductor approached the appellant, woke him up, and insisted that he get off the train. There is a sharp conflict in the evidence as to what occurred at that time, but the controversy ended by the respondent's getting off the train, assisted by the conductor. After they reached the station platform, some further talk was had, when the respondent was permitted to reboard the train and ride to the destination called for in his ticket. It is the respondent's contention that he was removed from the train with such force and violence as to injure him physically, and brought this action to recover for his physical injuries as well as for the shame and disgrace of having been wrongfully expelled from the train. The trial resulted in a verdict and judgment in respondent's favor in the sum of $700, and this appeal is prosecuted therefrom.

On the trial the appellant put the conductor on the witness stand, and proceeded to question him concerning the defendant's condition as to intoxication at the time he was put off the train at Priest River. To this the respondent objected, and the court ruling upon the objection said, "I don't think it is very material, or entitled to much weight, but the jury may consider it." The appellant thereupon excepted to the remarks as a comment upon the evidence, but the court neither withdrew the remarks from the jury, nor gave them any caution as to whom the duty belonged of judging the weight and credibility of the evidence.

Manifestly the remark was a comment on the evidence, and as such prohibited by § 16, art. 4 of the constitution. Was the remark prejudicial? We think it was. As we have said, there was a sharp conflict between the respondent and the conductor as to what occurred when the respondent was made to

leave the train, and, clearly, it would aid the jury in determining which of them told the truth to know their respective conditions as to sobriety. It is no justification to say that the comment occurred when the court was ruling on the admission of evidence, and not in the charge to the jury, as it is just as harmful to the party offering the evidence to have it discredited by the trial judge in advance of its admission as it is to have it discredited afterwards. For cases from this court where the general question is discussed, see, *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Wroth*, 15 Wash. 621, 47 Pac. 106; *State v. Hyde*, 20 Wash. 234, 55 Pac. 49; *State v. Surry*, 23 Wash. 655, 63 Pac. 557; *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804; *French v. Seattle Traction Co.*, 26 Wash. 264, 66 Pac. 404; *State v. Bliss*, 27 Wash. 463, 68 Pac. 87; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Manderville*, 37 Wash. 365, 79 Pac. 977; *Patten v. Auburn*, 41 Wash. 644, 84 Pac. 594.

The respondent testified that, on the afternoon of the day of the injury, he visited Priest River, going and coming on the appellant's trains. On cross-examination the appellant sought to ascertain the purpose of this visit, but objections to its questions directed to that end were sustained. It would seem that this might properly have been gone into. The respondent was complaining of physical injuries which his own testimony indicated were somewhat severe. As he paid this visit before he consulted with a physician concerning his injuries, and on the afternoon of the day he received them, it would have thrown some light on the question whether or not he was exaggerating his condition to know whether this visit was one of necessity or one of mere convenience. The cross-examination should have been permitted, at least to that extent.

Since there must be a new trial, it is not necessary to inquire whether or not the verdict was excessive.

The judgment is reversed and a new trial granted.

HADLEY, C. J., CROW, and RUDKIN, JJ., concur.

[No. 6727. Decided September 5, 1907.]

J. H. MEYERS, *Respondent*, v. SYNDICATE HEAT & POWER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE—SERVANT OF INDEPENDENT CONTRACTOR. The owner of a building is liable to the servant of a steam fitter engaged to do repair work in the building, for negligence in leaving exposed an unguarded hot water tank into which the servant fell while in the discharge of his duties, without contributory negligence or notice of the tank; since he is bound to maintain his premises in a reasonably safe condition and furnish a safe place to work, both as to his own servants or servants of an independent contractor invited to work there.

TRIAL—CHALLENGE TO EVIDENCE—EFFECT. A challenge to the sufficiency of the evidence should be overruled, if the testimony makes a case for the plaintiff, whether strictly within the pleadings or not.

SAME—VERDICT—DISREGARD OF INSTRUCTIONS—OBJECTIONS. A challenge to the sufficiency of the evidence does not raise the objection that the jury disregarded an erroneous instruction which was binding on them, and under which there was not evidence to sustain the verdict.

APPEAL—REVIEW—WAIVER OF ERROR. Appellant cannot raise the objection that there was no evidence to warrant a verdict upon an issue which was submitted to the jury by an instruction given at appellant's request.

MASTER AND SERVANT—RELATIONSHIP—QUESTION FOR JURY. Where the owner of a building employed a steam fitter to make repairs in a building, whether or not another steam fitter in the employ of the other, who was sent to do the work, is a servant of the owner of the building or of an independent contractor, is usually a question for the jury.

DAMAGES—INJURIES—EXCESSIVENESS. A verdict for $2,700 for an injury to a steam fitter from stepping into a tank of hot water, whereby his foot was badly burned, is excessive and should be reduced to $1,700, where the injury was not of a permanent character.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 18, 1906, upon the verdict of a jury rendered in favor of the plaintiff in the sum

[1]Reported in 91 Pac. 549.

of $2,700, after a trial on the merits, in an action for injuries sustained in stepping into an uncovered hot-water tank. Affirmed on condition of remitting $1,000.

Fogg & Fogg, for appellant. The burden was upon the plaintiff to prove his allegations that he was in the employ of the defendant. *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. 904; *Dyer v. Middle Kittitas Irr. Dist.*, 40 Wash. 238, 82 Pac. 301; *Singleton v. Felton*, 101 Fed. 526; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089, 1 L. R. A., N. S., 283. Richardson was an independent contractor and not an employee. *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703; *Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *City of Groesbeck v. Pinson*, 21 Tex. Civ. App. 44, 50 S. W. 620; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Geer v. Darrow*, 61 Conn. 220, 23 Atl. 1087. His employees had no right to put their tools in the room under the sidewalk, and were trespassers in going there. *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955; *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506, 79 Pac. 32; *Matson v. Port Townsend So. R. Co.*, 9 Wash. 449, 37 Pac. 705; *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 526; *Hamlin v. Columbia & Puget Sound R. Co.*, 37 Wash. 448, 79 Pac. 991; *Normile v. Thompson*, 37 Wash. 465, 79 Pac. 1095. They were not acting within the scope of their employment in going into that room, nor upon any invitation or license. *Krebbs v. Oregon R. & Nav. Co.*, 40 Wash. 138, 82 Pac. 130; *Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33, 63 Am. St. 153; *Wright v. Rawson*, 52 Iowa 329, 3 N. W. 106, 35 Am. Rep. 275; *White v. Peninsular R. Co.*, 20 Wash. 132, 54 Pac. 999; *Ellsworth v. Metheney*, 44 C. C. A. 484, 104 Fed. 119; *Peake v. Buell*, 90 Wis. 508, 63 N. W. 1053, 48 Am. St. 946; *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; *Morrison v. Burgess Sulphite Fibre Co.*, 70 N. H. 406, 41

trial, on the ground, among others, that the verdict was excessive and given under the influence of passion and prejudice. This motion the court likewise denied. The several rulings on these motions constitute the errors assigned on this appeal.

The motion to take the case from the jury, and the motion for a directed verdict raise but one question; namely, the sufficiency of the evidence to justify a verdict in favor of the respondent. And, since the jury found in favor of the respondent, we must accept as true, where the evidence is contradictory, that part most favorable to his contention. The evidence tended to show the following facts: The appellant operates a heat, light, and power plant in the basement of the Washington building, in the city of Tacoma; that a fixture connected with its plant was an exhaust pipe, which ran from the boiler room to near the center of the building, thence upwards through a light-well to the roof. To accommodate certain alterations that were being made in the building, it became necessary to change this pipe to another part of the light-well. One Charles Richardson was selected to do the work. The appellant's secretary called him down to the plant, showed him what was necessary to be done, and directed him to procure the necessary assistance and move the pipe to the required position, telling him that the change must be made on the coming Sunday, as that would be the first day the fires would be out and the pipe cool enough to be handled.

Richardson was a master steam fitter, maintaining a workshop in the city of Tacoma, where he kept all the necessary materials and tools to successfully carry on his trade. He also kept regularly in his employ a number of men, some of whom were master steam fitters, and others apprentices and helpers. The conversation between the appellant's secretary and Richardson occurred near the middle of the week, probably on Wednesday. After ascertaining what was to be done, Richardson sent a steam fitter by the name of Diamond, with a couple of helpers, to the plant, directing them to do certain preliminary work found necessary to be done before the pipe

could be moved. Diamond and the helpers went to the plant on Thursday, and continued working there during the remainder of the week. While working there, the tools used by them were kept, by permission of the appellant, in a room off the engine room towards the front of the building, called by the witness the toolroom. This room contained a work bench, and certain tools belonging to the appellant used in the business of steam fitting, and appears to have been used by the appellant as a work-shop for doing repair work.

The hot-water tank mentioned in the pleadings was in this room. It was a receptacle into which was drained the water condensing from the steam within the steam pipes. The respondent, who was also a master steam fitter, was at this time in the employ of Richardson working on a building in another part of the city. On Saturday preceding the Sunday it was expected to move the pipe, Richardson told the respondent of the fact, and requested that he go down there the next morning and do the work, telling him at the same time, in answer to inquiries, that he would find the necessary tools and helpers there when he arrived. The respondent reached the plant shortly before eight o'clock on Sunday morning, and found Diamond there in the engine room. They at once proceeded to change their street clothes for their working clothes, and when they had finished, the respondent inquired of Diamond concerning the tools. Diamond told him they were in the toolroom off the engine room, and they started for them, the respondent leading. They passed through the door into the room, and had just reached the work bench when the lights in the building went out. Diamond remarked that he had a candle and proceeded to light it with a match. He failed in his effort, and not having another match, the respondent said he would go and get matches. He turned and took a step or two towards the door when he stepped into the hot-water tank and received the injuries for which he sues. The tank was uncovered and unguarded, and the respondent

had not been told of its being in the room by the appellant, nor did he know of its existence.

The facts as here stated seem to us to warrant a recovery, no matter what view may be taken of the relation existing between the appellant and respondent. If the respondent was an employee of the appellant, then the appellant was liable on the principle that it failed to provide him a reasonably safe place in which to work. On the other hand, if he was an employee of Richardson and Richardson was an independent contractor, it is liable to him on the principle that he was on the appellant's premises by special invitation, and appellant owed him the duty to maintain the premises in a reasonably safe condition for the uses the invitation authorized him to make of them, which duty it failed to perform. It is true the appellant extended no express invitation to the respondent to enter upon its premises, but it contracted with Richardson to so enter, and by its contract gave him express authority to employ the respondent. But in the absence of such express authority, the rule is that the servant of an independent contractor engaged in work for the contractor on the premises of the proprietor is deemed to be thereon by invitation of the proprietor; and the proprietor owes him the same duty to provide for his safety that it owes to the contractor himself; namely, that he will maintain the premises in a reasonably safe condition for the uses the contractor or servant is entitled to make of them, and will not expose him to hidden dangers of which he is not aware, but which are known to the employer. Thompson, Negligence, §§ 680, 968, 979; *Spry Lumber Co. v. Duggan*, 80 Ill. App. 394; *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 294. So in this case, if the respondent's version of the occurrences is to be believed, the appellant owed the respondent the duty of either covering or guarding the tank into which he fell, or giving him timely warning of its existence; and failing in this, it rendered itself liable for the injuries received by him.

The appellant argues, however, in this connection, that the complaint proceeds upon the theory that the respondent was in the employ of the appellant, and that unless the respondent proved that fact the appellant was entitled to have its motion for judgment or for a directed verdict granted. But the motions of the appellant were nothing more than challenges to the sufficiency of the evidence, and the rule is that the challenge must be denied if the evidence itself makes a case against the challenging party, whether the case made falls strictly within the pleadings or not. To hold otherwise would be to deny the plaintiff the benefit of the statutes relating to amendments. It may be that in this case, owing to its somewhat peculiar circumstance, the appellant would have been entitled to have the respondent elect on which of these divergent principles he intended to rely, and compelled him to amend his complaint if he elected to rely on the principle that he was on the premises as an invitee of the appellant; but as no such request was made, the respondent cannot be held to be in default because he did not amend.

The appellant insists, also, that, since the court, at its request, charged the jury to the effect that they could not find for the respondent unless they found that he was an employee of the appellant at the time of the accident, and since, as it contends further, there was no evidence before the jury that he was such an employee, such charge became the law of the case, and entitled it to a verdict and judgment in the trial court, and consequently entitles it to a reversal in this court with instructions to enter a judgment in its favor. But while it is true this court has held that an instruction, even if erroneous or wrongfully given, is binding and conclusive upon the jury, and ground for reversal if the jury refuse to heed it (*Pepperall v. City Park Transit Co.*, 15 Wash. 176, 45 Pac. 743, 46 Pac. 407; *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115; *Dyer v. Middle Kittitas Irr. Dist.*, 40 Wash. 238, 82 Pac. 301), we think this question is not presented in this record. The question was not raised, as we have shown, by

the motion for nonsuit, since the court was bound to deny that motion if it found that the evidence justified a recovery on another theory than that outlined in the complaint; and it is not raised by this instruction, since the appellant not only did not except to it but expressly requested that it be given, and consequently is now estopped from asserting that there was no evidence in the record on which to base it.

But if we were to concede that the question was properly before us, we would hesitate to declare the verdict against the evidence. Whether a person employed to do a specific piece of work is a servant of his employer or an independent contractor is often a question difficult of solution, and frequently depends upon the answer given to the question, what is the proper conclusion to be drawn from the facts proven? Where the proper conclusion is doubtful, or where different minds may legitimately draw different conclusions from the facts proven, the question whether such person is a servant of the hirer or an independent contractor, is for the jury, and the trial court is in duty bound to submit the question to them. It seems to us that this record presents such a state of facts. Without going into an analysis of the evidence, we think the jury may well have found that Richardson was a mere employee of the appellant, and authorized by it to employ the respondent on its behalf. This being true, there is no error in the court's charge, even under the appellant's conception of the state of the record.

On the question of excessiveness of the verdict we think the appellant has cause to complain. While the respondent was badly burned, and suffered severely for a time therefrom, we think it not of such a permanent character as to warrant the amount awarded him. The judgment should not exceed $1,700.

If, therefore, the respondent will remit from the judgment, within thirty days after the remittitur reaches the trial court, the sum of $1,000, the judgment will stand affirmed as to the remainder, $1,700, and costs taxed in that court. If,

however, he fails to so remit within the thirty days, the judgment will be reversed and a new trial awarded. The appellant will recover costs in this court.

HADLEY, C. J., CROW, and RUDKIN, JJ., concur.

[No. 6769. Decided September 5, 1907.]

W. C. LABEE, *Respondent*, v. SULTAN LOGGING COMPANY, *Appellant*.[1]

APPEAL—REVIEW—NEW TRIAL. The grant of a new trial for errors of law occurring at the trial does not involve the discretion of the court, and is reviewable on appeal.

MASTER AND SERVANT—INJURIES—SAFE APPLIANCE—EVIDENCE—PRIMA FACIE CASE. That a steel cable, furnished by a master to be used for a particular purpose, broke when used for that purpose, in a proper manner, is sufficient evidence to make out a *prima facie* case of negligence on the part of the master in furnishing or using the cable.

SAME—PLEADING—CONCLUSIONS. A general allegation that a master failed to provide a safe place to work, following specific allegations of the acts committed, is a conclusion only, and does not admit evidence of negligence not covered by the specific charge.

Appeal from an order of the superior court for Snohomish county, Black, J., entered January 12, 1907, setting aside a nonsuit and granting a new trial, in an action for personal injuries sustained by an employee through the breaking of a cable. Affirmed.

Graves, Palmer & Murphy (*C. H. Winders*, of counsel), for appellant.

Roney & Loveless and *Hathaway & Alston*, for respondent.

FULLERTON, J.—This is an action for personal injuries. At the time he received the injury for which he sues, the respondent was in the employ of the appellant, working with a

[1]Reported in 91 Pac. 560.

gang of men engaged in loading sawlogs onto railroad cars. In loading the logs the men had the assistance of mechanical appliances. These consisted of a large heavy pole, some forty feet in length, known in the vernacular as a "gin pole," set with the heavy end in the ground by the side of the railroad track, and slanted over the track so that the upper end reached a point immediately above its center. The pole was stayed with three steel cables, one end of each of them being fastened to the top of the pole, and the other carried back and made fast to a tree or stump, or some other fixed object sufficiently secured in the ground to withstand a strain. Fastened to the top of the gin pole, so as to swing immediately under it, was a heavy pulley. Some distance back from the track a donkey engine was stationed, from which another wire cable was run through the pulley fastened to the gin pole. It was by means of this cable that the logs were rolled and lifted onto the cars.

The cable was also used for another purpose. Cars were brought to the loading station a number at a time. As they could be loaded only from a place on the track immediately under the gin pole, it was necessary, after loading a car, to move it forward on the track so that another might be brought in its place, and the practice was to leave the cars coupled together and move the entire train. This moving was done by hitching the cable, used to load the logs, onto the farther end of the car desired to be brought into position, and bringing it into place by a pull on the cable from the donkey engine.

At the time of the accident, the men had for loading a group of five cars. Four of these had been loaded, and preparations were made for bringing the fifth one into place. The track at this point was somewhat steep, and the cars were held in place by their brakes, which had to be loosened before the cars could be moved. Preparatory to loosening the brakes, the cable was hitched to the lower end of the empty car and made tight by a pull from the donkey engine. The respondent then mounted the cars and proceeded to loosen the brakes

with a short piece of gas pipe which he used as a lever. He was just loosening the last one when a pull was made in an attempt to move the cars. This pull caused one of the stay cables fastened to the gin pole to give way, letting the pole fall. In falling the pole struck the respondent on the back, bearing him down upon the piece of gas pipe, which he happened to be holding in an upright position, forcing the pipe entirely through his body and causing the injury for which he sues. It appears from the record, also, that the appliances described were furnished by the appellant, that they were being used at the time of the accident for the purposes for which they were intended, and were so used under the direction of the appellant's foreman.

In his complaint the respondent charged that the accident was caused by the defective and dangerous condition of the stay cable which gave way and let the gin pole fall, alleging that it was carelessly and negligently fastened to the gin pole, and had become old, worn, weakened and rusted and in need of repair, all of which was known to the appellant, or by reasonable diligence ought to have been known by it, but which was unknown to the respondent; further alleging, that "by reason of the negligence of the defendant in failing to provide the plaintiff with a safe place in which to work, and by reason of the negligence of the defendant in failing to provide a sufficient and suitable guy rope or cable to sustain the gin pole and perform the service required of the same, and by reason of the negligence of the defendant in failing to properly secure the said guy rope or cable," the gin pole fell, etc. The only evidence offered at the trial in support of these allegations was that above outlined, and the further fact that the cable gave way at the point where it was spliced to the gin pole, three of the strands of the splice breaking, and three pulling out.

On the trial, at the conclusion of the respondent's case, the court granted a nonsuit and discharged the jury; and later, on respondent's motion for a new trial, set the nonsuit aside

and granted a new trial. This appeal is from the last-mentioned order. The trial judge based his ruling on two grounds, first, that he had erred in holding that the respondent had failed to show any negligence on the part of the appellant; and second, that he had erred in excluding certain evidence offered by the respondent; and, as these propositions involve matters of law in which the question of discretion does not enter, they are reviewable on appeal to this court.

On the question of the sufficiency of the evidence, the appellant contends that the respondent has shown nothing more than that the cable broke and that he was injured thereby, and argues that this is not sufficient to charge the respondent with negligence; that in order to make a *prima facie* case, he was required to go further and show that the breaking was caused by some defect of construction or material, and that the respondent knew, or by reasonable diligence could have known, of such defect. But it seems to us that the appellant has placed a too narrow construction upon the respondent's evidence. The evidence, in addition to showing that the cable broke and caused an injury to the respondent, showed that it was furnished to the respondent by the appellant for a particular purpose, and that it broke while being used in a proper manner for the purpose for which it was intended. This is some evidence of negligence on the part of the appellant. Instrumentalities intended for a particular purpose, and suitable and proper for that purpose, do not break when put to the use for which they are designed when used in a proper manner. So the converse of this proposition must be true. If the instrumentality does break when put to the use for which it is designed and used in a proper manner, it is evident that it was either defective in material or construction in the first instance, or has become so since it was put to use. Therefore, when the servant shows that the master furnished him an instrumentality to be used for a particular purpose, that he used it for the purpose intended in the manner intended, and that it broke when being so used and injured him,

he makes out a *prima facie* case of negligence against the master. *Coleman v. Mechanics' Iron Foundry Co.*, 168 Mass. 254, 46 N. E. 1065; *Moynihan v. Hills Co.*, 146 Mass. 586, 16 N. E. 574, 4 Am. St. 348; *Tennessee Coal, Iron & R. Co. v. Hayes*, 97 Ala. 201, 12 South. 98; *Armour v. Golkowska*, 95 Ill. App. 492; *Solarz v. Manhattan R. Co.*, 31 Abbott's New Cases 426; *Highland Boy Gold Min. Co. v. Pouch*, 124 Fed. 148; *Cincinnati etc. R. Co. v. Roesch*, 126 Ind. 445, 26 N. E. 171.

With reference to the second question, we think the evidence offered was properly excluded under the issues as made. The allegation to the effect that the appellant failed to provide the respondent with a safe place in which to work was rather a deduction from the specific acts of negligence theretofore alleged than a general allegation of negligence. As such it did not widen the scope of the inquiry so as to admit evidence of negligence not covered by the specific allegations. *Henne v. Steeb Shipping Co.*, 37 Wash. 331, 79 Pac. 938; *Redford v. Spokane St. R. Co.*, 9 Wash. 55, 36 Pac. 1085. In so far, therefore, as the order for a new trial was based on the latter ground it was erroneous, but since it is sustained by the first ground stated, it must be affirmed. It is so ordered.

HADLEY, C. J., CROW, and RUDKIN, JJ., concur.

ROOT, J., dissents.

[No. 6561. Decided September 6, 1907.]

ANGIE B. COLLINS *et al.*, *as Executors, etc.*, *Appellants*, v. JAMES P. GLEASON *et al.*, *Respondents*.[1]

JUDGMENT—RES JUDICATA—ACTIONS—SPLITTING OF CAUSES. Upon a breach of an indivisible contract to convey certain lands, a judgment for specific performance as to one tract is a bar to another action for specific performance of another tract, where the failure to ask full relief was not due to fraud or mistake; since plaintiff cannot split up his cause of action.

SAME—PLEADING—JUDGMENT ON PLEADINGS—ESTOPPEL. Failure of defendant to plead a former judgment as *res judicata* does not estop the defendant from taking advantage of the defense by motion for judgment on the pleadings, where the plaintiff sets up the former adjudication as affirmative matter in a reply.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 19, 1906, dismissing, after a trial on the merits, an action for specific performance. Affirmed.

William Martin and *Jas. F. McElroy*, for appellants, contended, among other things, that distinct causes of action authorizing independent relief, need not be presented in the same suit. *Stark v. Starr*, 94 U. S. 477, 24 L. Ed. 276; *Skoglund v. Minneapolis St. R. Co.*, 45 Minn. 330, 47 N. W. 1071, 22 Am. St. 733, 11 L. R. A. 222; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Stroup v. Pepper*, 69 Kan. 241, 76 Pac. 825; *Lawrence v. Stearns*, 79 Fed. 878; *Phillips v. Berick*, 16 Johns. 136, 8 Am. Dec. 299. It is necessary to determine whether the same evidence would have sustained both actions. Rice, Evidence, § 312; *Buddress v. Schafer*, 12 Wash. 310, 41 Pac. 43; *Taylor v. Castle*, 42 Cal. 367; Wharton, Evidence (3d ed.), § 788; *West v. Hennessey*, 58 Minn. 133, 59 N. W. 984; *Dutchess of Kingston's Case*, 2 Smith Lead. Cases (8th Am. ed.), 916, 918, 927,

[1]Reported in 91 Pac. 566.

929; *Grayer v. Parker*, 24 Neb. 643, 39 N. W. 845, 8 Am. St. 227; *Gilmer v. Morris*, 30 Fed. 476; *Lore v. Truman*, 10 Ohio St. 45; *Porter v. Wagner*, 36 Ohio St. 471. The burden is upon the party relying upon the estoppel. *Hammer v. Pounds*, 57 Ala. 348; *Cook v. Burnley*, 45 Tex. 97. The estoppel or bar of the former action does not extend to this one. *Nickerson v. California Stage Co.*, 10 Cal. 520; *Lewis & Nelson's Appeal*, 67 Pa. St. 153; *Ihmsen v. Ormsby*, 32 Pa. St. 198; *Mersereau v. Pearsall*, 19 N. Y. 111; *Dulaney v. Payne*, 101 Ill. 325, 40 Am. Rep. 205; *Walker v. Kimball*, 22 Ill. 537; *Goodwin v. Goodwin*, 65 Ill. 497; Black, Judgments, § 726; 1 Ency. Plead. & Prac. 150. The rule against splitting a cause of action does not apply where there has been a fraudulent concealment of a cause. *O'Dougherty v. Remington Paper Co.*, 81 N. Y. 496; *Moran v. Plankinton*, 64 Mo. 337; 1 Ency. Plead. & Prac. 162; *Risley v. Squire*, 53 Barb. 280; *Bennett v. Hood*, 1 Allen 47, 79 Am. Dec. 705; *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644.

John B. Hart and *Maurice D. Leehey*, for respondents, to the point that there could not be a splitting of causes of action, and that the former judgment was a bar, cited: 1 Ency. Plead. & Prac. pp. 116, 148, 151; 5 Am. & Eng. Ency. Law (2d ed.), 776; Fletcher, Equity Plead. & Prac. § 116; *United States v. California & Oregon Land Co.*, 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476; *Bendernagle v. Cocks*, 19 Wend. 207; *Secor v. Sturgis*, 16 N. Y. 548; *Baird v. United States*, 96 U. S. 430, 24 L. Ed. 703; *Hill v. Joy*, 149 Pa. 243, 24 Atl. 293; *Willoughby v. Atkinson Furnishing Co.*, 96 Me. 372, 52 Atl. 756, 61 L. R. A. 567; *Wildman v. Wildman*, 70 Conn. 700, 41 Atl. 1; *Welles v. Rhodes*, 59 Conn. 498, 22 Atl. 286; *De Weese v. Smith*, 97 Fed. 309; *Wichita etc. R. Co. v. Beebe*, 39 Kan. 465, 18 Pac. 502; *King v. Chicago etc. R. Co.*, 80 Minn. 83, 82 N. W. 1113, 81 Am. St. 238, 50 L. R. A. 161; *Brannenburg v. Indianapolis, etc. R. Co.*, 13 Ind. 103, 74 Am. Dec. 250; *Achey v.*

Creech, 21 Wash. 319, 58 Pac. 208; *Bruce v. Foley*, 18 Wash. 96, 50 Pac. 935; *Hughes v. Dundee Mortgage Trust Inv. Co.*, 26 Fed. 831; *Hennequin v. Barney*, 24 Fed. 580; *Warren v. Comings*, 6 Cush. 103; *Green v. Bogue*, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1061.

Crow, J.—This action was commenced on June 22, 1901, by John Collins, now deceased, against James P. Gleason, H. S. Connor, and the Fidelity Trust Company of Seattle, a corporation, to compel the conveyance of certain lands in sections 25 and 30, township 21, north, range 5, E., W. M., in King county, Washington. The plaintiff in his amended complaint, dated October 2, 1902, alleged that Connor and Gleason were the president and secretary of the defendant corporation; that on or about January 22, 1901, an action, No. 31138, had been commenced by John Collins, as plaintiff, against the same defendants, to compel the defendants to transfer to him certain stock in the Fidelity Trust Company, or to reconvey certain property theretofore conveyed by him to such company; that the cause was afterwards settled, a written memorandum or agreement being made as follows:

"Seattle, Washington, May 3rd, 1901.

"Collins surrender 6240 shares, stock and trust certificate on Island County land.

"Fidelity Trust Company make special warranty to Collins for all real estate conveyed by him to company, mortgage on tide land assumed by Collins and take property in mortgage. Company also to convey to Collins one-half interest in Anacortes judgment. All monies now on hand belonging to corporation, except Colman money now in court, to go to plaintiff.

"Collins vs. Fidelity Trust Company to be dismissed, each party to pay own costs.

"Defendants to have Colman money now in court, and to have no other money from plaintiff.

"Defendants to pay no cost of receivership.

"Martin vs. Fidelity Trust Company to be dismissed without cost to either party.

"Conner vs. Collins to be dismissed without cost to either party.

"Fidelity Trust Company vs. Colman to be dismissed without cost, and release of all claims against each other, growing out of any of said suits.

"Roberts & Leehey, Attorneys for Defendant.
"William Martin, Attorney for Plaintiff."

that the plaintiff fully performed the agreement on his part; that the plaintiff had theretofore conveyed to the defendant company the land above mentioned, but that the defendant neglected and refused to reconvey it to him in pursuance of the terms of the written agreement. The defendants in their answer, after making certain denials, in substance alleged that the defendant company never authorized the written agreement; that it had never ratified the same; that the plaintiff was not entitled to any conveyance, and that the defendant company, by its answer, offered, by placing all parties *in statu quo*, to rescind any action its officers had taken towards part performance of the written agreement. To this answer the plaintiff originally replied by denials only. On July 11, 1903, it having been suggested to the trial court that the plaintiff John Collins had died testate, an order was entered substituting Angie B. Collins, John Francis Collins, and R. L. Hodgdon, his executors and trustees, as parties plaintiff. On March 30, 1904, the substituted plaintiffs, with leave of court, served and afterwards filed a supplemental reply, in which they affirmatively alleged that theretofore, to wit, on May 7, 1901, John Collins, as plaintiff, instituted action No. 32452 aginst the Fidelity Trust Company of Seattle, one of the defendants herein, to compel specific performance on the part of the Fidelity Trust Company of the above contract, by requiring it to assign to Collins a certain lease from the state of Washington to the Fidelity Trust Company of a certain harbor area in King county, Washington, in said lease and in the pleadings of said action particularly described,

being lease No. 64, the said contract upon which said action was brought being the same contract and agreement set forth in the amended complaint and the answer in this action; that thereafter such proceedings were had in said cause No. 32452 that, on August 20, 1902, a final decree was entered in favor of the plaintiff Collins, requiring the defendant Fidelity Trust Company to specifically perform the contract by assigning the lease; that the Fidelity Trust Company appealed to the supreme court of the state of Washington; that on October 3, 1903, subsequent to the filing of the original reply herein, the supreme court affirmed said decree, and that all issues raised by the affirmative defense herein were raised in said cause No. 32452, and determined in favor of the plaintiff Collins. Upon these issues, trial was had, and after the plaintiffs had introduced their evidence and rested, the defendants declined to offer any evidence, but moved for judgment. The trial court thereupon, without making any findings of fact, entered a final judgment dismissing the action. The plaintiffs have appealed.

The appellants contend that the trial court erred in dismissing the action. The respondents contend, (1) that the act of the attorneys in making the memorandum of settlement was unauthorized; (2) that the same was never ratified by the Fidelity Trust Company; and (3) that, even if it was executed with full authority and subsequently ratified, this action cannot be maintained, as the appellants' testator during his lifetime maintained one action to enforce the same agreement in which he obtained judgment, and that if the testator ever had any cause of action against the respondent company, as alleged in the complaint herein, the same was split by the former action, and the present one cannot be maintained.

The last point being conclusive of this case, the others will not be considered. It appears from the evidence, as well as the allegations of the supplemental reply, that action No. 32452 in the superior court of King county was instituted for

the purpose of securing the specific performance of the identical agreement upon which the present action is based, and that the decree entered therein, in favor of appellants' testator, was afterwards affirmed by this court. *Collins v. Fidelity Trust Co.*, 33 Wash. 136, 73 Pac. 1121. This is a subsequent and independent action, brought on the same contract. Although appellants' testator heretofore compelled the respondent, the Fidelity Trust Company, to specifically perform the contract by assigning to him the tide land lease, they are now seeking to compel it to further specifically perform by conveying to them the land in dispute. Appellants' testator never had more than one cause of action on the contract. The failure of respondent to convey all the lands contemplated thereby was but one breach, which authorized one action only. For one breach of an indivisible contract there can arise but one cause of action, and if in such action the plaintiff does not demand the entire relief to which he is entitled, he cannot afterwards complain. If this action can now be maintained, the appellants can hereafter maintain any number of additional actions upon the same contract. The recent case of *Kline v. Stein*, 46 Wash. 546, 90 Pac. 1041, is controlling here.

Appellants contend that the respondents cannot claim they are estopped by the former judgment, for the reason that the respondents did not plead such former judgment. The appellants themselves pleaded it in their supplemental reply, and when they did so, the respondents demanded judgment upon the pleadings. The former judgment had not been entered when the original answer was made herein. The facts were all before the court in this action, and we fail to see why it should not apply the law to the facts pleaded and admitted, whether pleaded by the respondents or the appellants. The appellants further contend that, at the time of the bringing of the former action, they had not discovered the failure of the respondents to convey the land now in dispute; that they

learned of such omission later but prior to the commencement of this action. The amended complaint, however, contains no allegation that such want of knowledge was due to the fraud or deceit of the respondents. Appellants' testator did discover such failure to convey, not only before the former judgment was entered, but also before he filed his amended complaint in this action. He had ample opportunity to ask the additional relief, by specific performance, in such amended complaint, but failed to do so. It is a general rule in both law and equity that, where a party inadvertently or by reason of his own negligence or mistake, and without fault or fraud of the adverse party, takes judgment or decree for less than he is entitled to recover, he is estopped from bringing a second action for the residue. When the appellants' testator discovered the omission or failure of the respondents to make an assignment of the tide land lease, it was his duty to immediately ascertain whether other omissions or breaches of the contract existed, and to bring his action for all remedies to which he was then entitled. Having failed to do this, he certainly could, in his amended complaint, have demanded the further specific performance now sought, as the record discloses that he did actually learn all the facts in ample time to do so. In *Kline v. Stein, supra*, we said:

"But the appellants assert that the allegation to the effect that this tract was left out of their original complaint through accident and mistake was made advisedly, and, inasmuch as the respondents' motion for judgment on the pleadings concedes it to be true, this fact alone is sufficient to show the inconclusiveness of the original judgment. This contention, also, mistakes the rule. If the appellants have, by accident or mistake on their part, failed to recover all of the land that they were entitled to recover, their remedy is not to sue for the omitted portion, but is rather to seek relief in the original action by opening up the judgment, amending their pleadings, and trying anew their rights to the property."

The appellants in this action have not only elected to retain the original judgment and its fruits, but they have also

rejected the offer and tender of the respondents to place the parties *in statu quo*.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, MOUNT, and DUNBAR, JJ., concur.

[No. 6560. Decided September 6, 1907.]

ANGIE B. COLLINS *et al.*, *as Executors, etc.*, *Appellants*, v. JAMES P. GLEASON *et al.*, *Respondents*.[1]

JUDGMENT—RES ADJUDICATA—ACTIONS—SPLITTING CAUSES. Judgment in an action for breach of an entire contract, granting the specific performance prayed for by plaintiff, is a bar to a subsequent action by the same plaintiff seeking to reform the original contract, as the two might have been joined in the first instance, and plaintiff cannot split his cause of action.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 19, 1906, dismissing, after a trial on the merits, an action to reform a deed. Affirmed.

William Martin and *Jas. F. McElroy*, for appellants.

John B. Hart and *Maurice D. Leehey*, for respondents.

PER CURIAM.—This action, which was commenced on June 22, 1901, arises upon the same memorandum of agreement upon which cause No. 6561, *Collins v. Gleason*, *ante* p. 62, 91 Pac. 566, decided by this court on this date, is based. The plaintiffs here sue to reform a deed executed by the defendant, the Fidelity Trust Company, in part performance of that agreement, it being alleged that certain land was, by mutual mistake, incorrectly described therein. From a judgment in favor of the defendants, the plaintiffs have appealed.

The appellants have heretofore recovered a judgment for

[1]Reported in 91 Pac. 568.

specific performance in a separate action on the same contract; hence on the authority of *Collins v. Gleason*, *supra*, the judgment herein must be affirmed. Although the appellants here seek to reform the original contract, there has nevertheless been a splitting of actions, as actions to reform and specifically enforce the same contract may be joined. We will, however, state that we do not find the evidence sufficient to sustain the appellants' allegation of mutual mistake.

The judgment is affirmed.

[No. 6718. Decided September 6, 1907.]

JOHN SHEA, *Respondent*, v. SEATTLE LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURIES—DEFECTIVE APPLIANCES—PROMISE TO REPAIR—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTIONS FOR JURY. In an action by an employee for personal injuries sustained while cleaning a chute beneath an edger, with a defective appliance (a long stick), after complaint made and under a promise to provide a suitable appliance, the questions whether the plaintiff continued his work for an unreasonable time after the promise to repair, and whether he was guilty of contributory negligence, are for the jury, where it appears that the injury occurred within two days after the promise was given, and plaintiff had continued work relying upon the promise; that the stick used was provided for that purpose, plaintiff had seen others using it, and there was no evidence that a larger stick was available, and plaintiff testified that he used it with the utmost care; and that the plaintiff had no control over the machinery and it was not customary to stop the machinery while cleaning out the chute.

DAMAGES—INJURIES—EXCESSIVENESS. A verdict for $8,000 for the loss of the left arm, by a man 27 years of age, is not excessive.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 23, 1906, upon the verdict of a jury rendered in favor of the plaintiff, after a trial

[1]Reported in 91 Pac. 623.

on the merits, in an action by an employee in a mill to recover for personal injuries sustained through the use of a defective appliance. Affirmed.

Richard S. Eskridge (*Philip Tindall*, of counsel), for appellant.

Martin J. Lund and *Vince H. Faben*, for respondent.

Crow, J.—This action was brought by John Shea against the Seattle Lumber Company, a corporation, to recover damages for personal injuries. From a judgment for $8,000 in favor of the plaintiff, the defendant has appealed.

The appellant contends that the trial court erred, (1) in refusing to take the case from the jury and enter judgment at the close of respondent's evidence, and again at the close of all the evidence; (2) in denying the appellant's motion for judgment notwithstanding the verdict; and (3) in denying appellant's motion for a new trial.

The sole question presented is whether the evidence sustains the verdict and judgment. In passing on this question we must consider the evidence in the light most favorable to the respondent. The facts thus disclosed show that the respondent had for two years been an employee in the appellant's lumber and shingle mill in the city of Seattle. In the mill was a certain edger machine provided with seven or eight circular saws which were mounted on an axle or arbor. In front and to the rear, rollers were used to convey lumber to the saws. Beneath the edger was a chute for sawdust, splinters, bark, and other refuse. In the lower portion of the chute was a grating through which sawdust and the smaller particles of refuse passed. The grating and chute sometimes became clogged, and it then became the duty of some employee to clear it by pushing down the refuse material. Prior to the accident a wooden stick about ten to twelve feet in length was used for this purpose. The saws were guarded at the top and front of the edger, but back of the saws and below the arbor and

rear roller was an opening, about twelve inches wide, extending across the full width of the machine. In cleaning the chute an employee would shove a long stick into this opening and by its use clear away the refuse. This had to be done frequently as conditions required.

The respondent, Shea, had for some time been in charge of certain levers near the edgers, but not connected therewith. His evidence shows that the appellant's foreman, shortly before the accident, instructed him to clean the chute when clogged; that a wooden stick of one by two inches, about ten or twelve feet long, was provided for his use; that a few days prior to the accident, he broke the stick while using it; that he then realized its use was dangerous; that he immediately complained to the foreman and requested him to provide a long iron rod in place of the stick; that the foreman promised to do so, but requested the respondent to continue his work with the stick until an iron rod could be made; that relying upon the foreman's promise, respondent continued using the stick, exercising the utmost care; that within two days thereafter the stick broke causing respondent to lose his balance; that his fingers were thrown in contact with the unguarded saws; that his left arm was drawn under the machine, and so severely injured as to necessitate amputation about four inches below the shoulder.

Although it is insisted that the appellant was negligent in having failed to properly safeguard the saws at the back of the edger, we will only consider the respondent's contention that appellant's negligence also consisted in its failure to provide him with safe appliances for his work. He insists that the use of a wooden stick was hazardous, unsafe and dangerous. The work of cleaning the chute had been required of the respondent but a short time prior to the accident. He had previously seen other employees using the stick. He testified that, when he afterwards learned and appreciated the unnecessary hazard to which he was subjected by its use, he would not have continued the work but for his reliance upon

the foreman's promise to provide him with a safe appliance. He further testified that the foreman had repeatedly seen him and other employees using a stick, but interposed no objection. The foreman denied that the respondent asked him for an iron rod or that he promised one. An iron rod was provided immediately after the accident, either the same evening, or early the next morning. Appellant's president and manager testified that he, without request from any person, ordered this iron rod after the accident. The jury, in response to a special interrogatory, affirmatively found that the foreman did, prior to the accident, promise respondent to provide the iron rod.

It is elementary law that it is the duty of a master to provide his servant with reasonably safe machinery, tools, and appliances with which to perform the work required of him, and to also keep the same in reasonably safe condition. Whether the stick used met this requirement was a question of fact to be submitted to the jury. It is contended by the appellant that the respondent had just as much knowledge of the fact that the stick was a dangerous and unsafe appliance as had the master, and that the respondent therefore assumed the risk of all dangers which might result from its use. This would be true had the respondent continued its use without objection or complaint after he actually appreciated the danger, but he only did so for a reasonable time while relying on the promise of the master. After appellant's foreman had made this promise, it assumed all risk of dangers arising from respondent's careful use of the unsafe appliance during such reasonable time as might thereafter be necessary to provide the iron rod. In *Crooker v. Pacific Lounge & Mattress Co.*, 29 Wash. 30, 38, 69 Pac. 359, this court quoted with approval the following language from § 215 of Shearman & Redfield on Negligence:

"There is no longer any doubt that where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a

period of time after the promise as would be reasonably allowed for its performance, or indeed, within any period which would not preclude all reasonable expectation that the promise might be kept. And the same principle applies to a case where the master promises to a servant to discharge an incompetent fellow servant, but fails to do so, and the former servant is thereby injured, or where a servant, apprehending a particular danger, makes it known to the master, who assures him that he will provide against it. Nor, indeed, is any express promise or assurance from the master necessary. It is sufficient, if the servant may reasonably infer that the matter will be attended to."

This doctrine must be applied to the facts before us, and it was the province of the jury to determine whether the respondent continued work for an unreasonable time after the promise was made.

The appellant, however, strenuously urges that the respondent is not entitled to recover, as he was guilty of contributory negligence in the following particulars: (1) In using a stick one by two inches in size, or a stick of any inadequate size, when he realized that it was apt to break and knew, as shown by the evidence, that pieces of suitable dimensions were readily available; (2) in doing his work in such a manner as to cause the stick to break, and throw his hand against the saw; and (3) in attempting to clean the chute, without first having the edger stopped, or the saws moved out of the way.

As to the first contention, there is evidence that respondent used a stick which was kept near the edger for that purpose. There is no affirmative showing that one of any other dimensions was suitable or could have been used. In the absence of some positive evidence that a larger stick could have been used, negligence arising from its nonuse will not be presumed. As to the second contention, respondent's evidence shows that he exercised the utmost caution in using the stick after the foreman's promise had been made, and there is no evidence in the record which would justify us in holding him negligent as a matter of law in this regard. The question as to whether

his manner of using the stick, after the foreman's promise, was careful or reckless was one of fact for the jury.

The appellant's main contention seems to be that the respondent should have caused the edger to be stopped or the saws to be moved before he attempted to clean the chute. It insists there were two ways in which the work could have been done, the one safe by stopping the edger or moving the saws, and the other unsafe by not stopping the edger or moving the saws; and that as the respondent chose the latter method he cannot recover. In support of this contention appellant cites, *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Johnson v. Anderson & Middleton Lumber Co.*, 31 Wash. 554, 72 Pac. 107; *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981; *Hunter v. Washington Pipe etc. Co.*, 43 Wash. 167, 86 Pac. 171; *Laidley v. Musser Lumber etc. Co.*, 45 Wash. 239, 88 Pac. 124. We do not regard any of these cases as applicable to the peculiar facts before us. In all of them, except the *Hoffman* and *Hunter* cases, the injured plaintiffs had control of the machinery, with the right and power to stop it. In none of the cases cited, except the *Johnson* case, does it appear that any promise had been made similar to the one made to the respondent. In the *Johnson* case, although the foreman had promised to fix the electric light, the plaintiff who had charge of the edger, with power to stop it, was shown to have been guilty of conduct which constituted contributory negligence, as a matter of law, notwithstanding the promise made. The master's promise to provide safe appliances will not justify willful recklessness on the part of the servant. He must exercise reasonable caution while relying upon the promise and awaiting its fulfillment. The evidence here shows that the edger and saws were in the exclusive control of the edgerman, that they were not in the control of the respondent, and that it required three men to stop the edger. The evidence further indicates that the custom in appellant's mill was to clean the chute while the edger was running. It is not shown that the machinery was

ever stopped, or that the saws were moved by respondent or any other employee, at any time in the history of the mill for the purpose of cleaning the chute. The fact that a long stick was provided indicates that it was to be used while the machinery was in motion. The foreman saw and permitted respondent to use the stick without stopping the edger or changing the saws, and even after the accident an iron bar was provided, showing that the appellant still intended to permit the cleaning of the chute without stopping the edger or moving the saws. The evidence discloses no rule of the mill for doing the work in any other manner. These facts clearly distinguish this case from those cited by the appellant. Courts do not hold plaintiffs guilty of contributory negligence, as a matter of law, unless the circumstances are such that reasonable men may not differ as to the existence of such contributory negligence. The question of the existence or nonexistence of contributory negligence upon the part of the respondent was, under the evidence before us, an issue of fact to be submitted to the jury.

The appellant further contends that the damages awarded are excessive. The respondent, a young man twenty-seven years of age, in good health, lost his left arm. We cannot hold that for such an injury the damages were excessive.

The judgment is affirmed.

Hadley, C. J., Fullerton, Rudkin, Mount, and Dunbar, JJ., concur.

[No. 6767. Decided September 6, 1907.]

In Re PETRIDGE'S WILL.

H. B. PETRIDGE, *Appellant*, v. T. H. KOLDERUP, *Respondent*.[1]

WILLS—REVOCATION—MARRIAGE—HUSBAND AND WIFE—STATUTES—CONSTRUCTION. The will of a *feme sole* is revoked by her marriage if her husband survives her, under Bal. Code, § 4598, so providing as to a man whose wife survives, and Bal. Code, § 4615, providing that words importing the masculine gender may be extended to females, when such construction is necessary, in view of our community property laws placing man and wife upon an equality as to property rights, testamentary capacity, and right of inheritance.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 28, 1907, admitting a will to probate and appointing an administrator with the will annexed. Reversed.

Fred H. Peterson and *H. C. Force*, for appellant.

S. S. Langland, for respondent.

CROW, J.—On April 27, 1903, Alexia Caroline Halvorsen, a single woman, residing in Seattle, executed her last will and testament, devising her entire estate to her brother, Emil Nelson, of Bordeaux, France. On October 11, 1905, she married H. B. Petridge, whom she did not know at the date of the will. They lived together as husband and wife until December 27, 1906, when she died without issue. H. B. Petridge filed in the probate department of the superior court, in and for King county, a petition for his appointment as administrator, alleging that the will above mentioned had been revoked by subsequent marriage of the testatrix. T. H. Kolderup, on behalf of Emil Nelson, also filed a petition for the probate of the will and his appointment as administrator *cum testamento annexo*, the will having named no executor. From

[1]Reported in 91 Pac. 634.

an order admitting the will to probate and appointing T. H. Kolderup administrator *cum testamento annexo*, H. B. Petridge has appealed.

The only question on this appeal is whether the will of Alexia Caroline Halvorsen was revoked by her marriage. At common law the subsequent marriage of a *feme sole* revoked her will, for by such marriage she was deprived of testamentary capacity, her will ceased to be ambulatory in its nature, and was therefore void. Subsequent marriage of a man did not revoke his will, for the common law made sufficient provision for his wife by her right of dower. But a subsequent marriage and birth of a child taken together, revoked his will. 2 Greenleaf, Evidence, § 684; 4 Kent, Commentaries, §§ 521-7.

The first legislature of Washington territory, Laws 1854, p. 312 (Abbotts Real Property Statutes, 381), passed an act relating to wills which contained the following sections.

"Sec. 1. Be it enacted by the Legislature of Washington Territory, That every person of twenty-one years of age and upwards, of sound mind, may by last will, devise all his estate, real and personal, saving to the widow her dower."

"Sec. 3. A married woman may by will, dispose of any real estate held in her own right, subject to any rights which her husband may have as tenant by curtesy."

"Sec. 7. If after making a will, disposing of the whole estate of the testator, such testator shall marry and die, leaving issue by such marriage living at the time of his death, or shall leave issue of such marriage born to him after his death, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, and no evidence shall be received to rebut the presumption of such revocation."

"Sec. 8. A will made by an unmarried woman shall be deemed revoked by her subsequent marriage."

The enactment of the above sections 7 and 8 was an adoption of common law principles by our first territorial legislature.

This statute was continued without change until the territorial legislature passed an entirely new probate act, Abbotts

Real Property Statutes, 385, Laws 1860, p. 165, chapter 2 of which related to wills. In this chapter, sections 3 and 8 of the act of 1854 were continued without change, while sections 1 and 7 were respectively succeeded by the following:

"Sec. 18. Every person who shall have attained the age of majority, of sound mind, may, by last will, devise all his estate, real and personal. This section shall not be construed as depriving a widow of her dower, nor a husband of his interest as tenant by the curtesy."

"Sec. 23. If, after making any will, the testator shall marry, and the wife shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for her by marriage contract, or unless she shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation, shall be received."

The acts of 1854 and 1860 both preserved to the widow and the husband, respectively, the common law estates of dower and tenancy by the curtesy, which have since been abolished and no longer exist in this state.

In Laws of 1873, p. 252 (Abbotts Real Property Statutes, 390), the territorial legislature again enacted a probate practice act, of which chapter 3, sections 22 to 43 inclusive, related to wills. These sections, which were incorporated in the Code of 1881 without change, are now sections 4594 to 4615, Bal. Code (2340 to 2361 Pierce's Code). Section 8 of the act of 1854, providing that subsequent marriage should revoke the previous will of an unmarried woman, was omitted from this act of 1873, while § 23 of the act of 1860 was reenacted as § 26 [Bal. Code, § 4598 (P. C. § 2344)], with the exception that the words "marriage settlement" were substituted for the words "marriage contract." The chapter of the act of 1873 relating to wills also contained an entirely new section, number 43, being Bal. Code, § 4615 (P. C. § 2361), reading as follows:

"Sec. 43. Words in this chapter contained, or in this act which import the singular number only, may also be applied

to the plural of persons and things, and words importing the masculine gender only, may be extended to females also when such construction shall be necessary."

Section 4597, Bal. Code (P. C. § 2343), relative to the revocation of wills, is to be found in all three of the territorial laws above mentioned, except that the words "testatrix" and "her" appeared first in 1873.

The respondent contends that the omission of original section 8 of the act of 1854 from the act of 1873 shows a legislative intent that the will of an unmarried woman should not thereafter be revoked in the event of her subsequent marriage. There might be some merit in this contention but for the fact that at the identical time § 8 was omitted, § 43 [Bal. Code, § 4615 (P. C. § 2361)], was first enacted. The appellant insists that, applying the rule of construction therein announced to § 4598, *supra*, the latter should be construed under the facts of this case to read as follows:

"If, after making any will, the testatrix shall marry and the husband shall be living at the time of the death of the testatrix, such will shall be deemed revoked . . . unless he be provided for in the will, or in some way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received."

Having due regard to the language used in the two sections now being construed, and also considering the history of our legislation on wills, property rights of husband and wife, and the descent of realty and personalty, we hold that the construction urged by appellant is necessary, and should be adopted. Endlich, Interpretation of Statutes, § 182. The acts of 1854 and 1860 relating to wills both protected the common law estates of dower and tenancy by the curtesy from destruction by the will of either the husband or wife. The first legislature, Laws 1854, p. 308, in chapters 11 and 12 of an act relating to executors, administrators, and the distribution of real and personal property, enacted a law of descents, chapter 11,

making no provision for the inheritance of real property by the husband from the wife or by the wife from the husband, although, chapter 12 did provide for such distribution of personalty under certain conditions. Section 242 of chapter 11, however, reads as follows:

"Nothing contained in this act shall affect the title of a husband as tenant by curtesy, nor that of a widow as tenant in dower."

In 1869, the first separate and community property law defining the rights of married persons was enacted, Laws 1869, p. 318 (Abbotts Real Property Statutes, 471). This statute was materially amended in 1871, Session Laws, page 67 (Abbotts Real Property Statutes, 474), but was reenacted in 1873, Laws 1873, page 450. It is evident from the separate and community property law originally passed in 1869, and reenacted in 1873, and the probate practice act of 1873, that the trend of legislation was a departure from the common law principles, with a tendency towards an equalization of the property rights of husband and wife. An examination of the probate act, and other statutes of 1873, however, discloses that no change in the law of descents was then made. The original act of 1854 relating to descents, with some immaterial amendments, was permitted to continue, doubtless by reason of legislative oversight or inadvertence. At the succeeding 1875 session, however, Laws 1875, p. 53, the legislature passed an act to regulate the descent of real estate and the distribution of personal property. This act for the first time provided for inheritance of realty by the husband and wife, the one from the other, making no mention of the estates of dower or tenancy by the curtesy. This legislation discloses an evident intention to harmonize the statute relating to wills and the law of descents with existing property rights under the separate and community property act then in force. Later amendments to the law of descents, and the law of separate

and community property, perfecting such harmony, have resulted in our present statutes on these subjects.

The entire trend of legislation since 1869 has been a departure from common law rules, with the evident intention of placing the husband and wife, as nearly as possible, upon an equality the one with the other, not only in their property rights, but also in their testamentary capacity, and their rights of inheritance, the only exception as to their property rights now being that the husband has the management and control of all of the community property, and the right to alienate community personalty. This exception, however, is necessary to enable him, as head of the family to engage in business and trade for the benefit of the community of which he is a member. Although these various laws have been at times crude, incomplete, and somewhat inconsistent, the ultimate purpose of the successive legislatures has been to secure harmony and equality. While applying proper methods of interpretation, our laws should be construed, if possible, to promote this harmony. The construction of Bal. Code, §§ 4598 and 4615, urged by appellant accomplishes this result without violence to any correct method of interpretation, while the construction asked by respondent would have the opposite effect.

Many unfortunate conditions might result were the contention of the respondent sustained. For instance, an unmarried woman could by will devise her entire estate. She might then marry, and although she and her husband might thereafter accumulate a large community estate, her previous will, if not revoked, would, in the event of her death without issue, pass one-half of such community estate to her legatees. On the other hand, a husband's will being revoked by subsequent marriage, the entire community estate, in the event of his death without issue, would pass to his widow. Again, if a single woman devised her separate estate and afterwards married, her will not being thereby revoked, her entire separate estate would, in the event of her death, pass to her legatees, while in the case of her husband, his will being re-

voked by subsequent marriage, one-half, or at least one-third, of his separate estate would, in the event of his death, descend to his widow by inheritance. These illustrations, and others that might be suggested, show that the construction for which the respondent contends does not preserve that harmony and equality in our laws pertaining to wills, property rights, and descent intended by our legislatures.

Testamentary incapacity in a married woman being the basis of the common law rule revoking her will executed while a *feme sole*, various courts hold that, when such testamentary incapacity has been removed by statute, the reason of the rule ceases, and that the rule itself therefore ceases to exist. *Kelly v. Stevenson*, 85 Minn. 247, 88 N. W. 739, 89 Am. St. 545, 56 L. R. A. 754; *In re Hunt's Will*, 81 Me. 275, 17 Atl. 68; *Will of Ward*, 70 Wis. 251, 25 N. W. 731, 5 Am. St. 174; *Roane v. Hollingshead*, 76 Md. 369, 25 Atl. 307, 35 Am. St. 438, 17 L. R. A. 592; *Morton v. Onion*, 45 Vt. 145; *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328; *In re Tuller's Will*, 79 Ill. 99, 22 Am. Rep. 164.

The respondent has cited some of the cases mentioned above, and urges their application here. We do not regard them as pertinent under our present statutes, which make the husband and wife heirs one to the other. *In re Tuller's Will, supra*, is one of the cases cited by respondent, but the supreme court of Illinois, in *Tyler v. Tyler*, 19 Ill. 151, 155, says:

"We hold, that marriage under our statute making the wife heir to the husband and the husband heir to the wife, where there is no child or descendant of a child, is, in the absence of facts showing an intention to die testate arising subsequent to the marriage, a revocation of a will of the husband, made prior to the marriage, disposing of his entire estate without making provision in contemplation of the relations arising out of it."

The doctrine of this case is not only recognized in the *Tuller* will case, *supra*, but it has been frequently followed by the Illinois court, although at common law subsequent marriage and birth of a child, taken together, were required to

revoke the will of an unmarried man. *American Board of Foreign Missions v. Nelson*, 72 Ill. 564; *Duryea v. Duryea*, 85 Ill. 41; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; *Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985.

In harmony with these Illinois cases, is *In re Teopfer*, 67 L. R. A. 315, in which the supreme court of New Mexico, under a statute making the husband and wife heirs to each other, applied the same rule to a will executed by a single woman who afterwards married and died without issue. See, also, *Durfee v. Risch*, 142 Mich. 504, 105 N. W. 1114, 5 L. R. A. (N. S.) 1084; *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 427; *Scherrer v. Brown*, 21 Colo. 841, 42 Pac. 668.

Our construction of §§ 4598 and 4615, Bal. Code, we regard as being in complete harmony with former decisions of this court on kindred questions. *In re Murphy's Estate*, 30 Wash. 9, 70 Pac. 109; *In re Feas' Estate*, 30 Wash. 51, 70 Pac. 270. See, also, *Durfee v. Risch, supra; Ellis v. Darden*, 86 Ga. 368, 12 S. E. 652, 11 L. R. A. 51; *Owens v. Haines*, 199 Pa. 137, 38 Atl. 859; *Smith v. Allen*, 31 Ark. 268.

Respondent contends that the word "necessary," found in Bal. Code, § 4615, forbids the construction adopted by us, as no necessity for any such interpretation exists. There has been considerable discussion in the briefs of the correct definition of the word "necessary" as here used. Such discussion is immaterial, as a necessity for our interpretation does exist—to enforce evident legislative intent and to preserve the harmony of our laws pertaining to wills, property rights, and descents.

The honorable trial court erred in admitting the alleged will to probate, and in appointing T. H. Kolderup administrator *cum testamento annexo*. The judgment is reversed and the cause remanded with instructions to enter an order refusing to probate the will, and also an order appointing the appellant administrator of the estate of his deceased wife.

Hadley, C. J., Fullerton, Rudkin, and Dunbar, JJ., concur.

[No. 6374. Decided September 6, 1907.]

FREDERICK & NELSON, *Plaintiff*, v. SPOKANE GRAIN COMPANY, *Appellant*, and E. B. MCGILL, *as Trustee, etc.*, *Respondent*.[1]

BILLS AND NOTES—ACCEPTANCE—WRITING—ASSIGNMENTS—STATUTES—CONSTRUCTION. Under Laws 1899, p. 362, § § 126, 127, defining a bill of exchange to be a signed order requesting another to pay a sum to a third person, and providing that it does not operate as an assignment or create any liability until accepted in writing, an order requesting that sums due or to become due to the drawer from the drawee, be paid to a third person, does not amount to an equitable assignment of the funds or render the drawees liable thereon until the order is accepted by them in writing.

Appeal from a judgment of the superior court for King county, Neterer, J., entered April 30, 1906, after a trial before the court without a jury, in an action of interpleader, awarding a deposit in court to one of the defendants. Affirmed.

James McNeny, for appellant.

Samuel Morrison, for respondent.

MOUNT, J.—Prior to August 10, 1905, one James Madsen was conducting a boarding stable for horses in the city of Seattle. He had an agreement with Frederick & Nelson to feed for them about twenty-four head of horses, at the price of $18 per head per month. It was customary for Frederick & Nelson to pay their bill for each month about the 5th of the succeeding month. On or about August 10, 1905, the Spokane Grain Company agreed to furnish Madsen with hay and grain for an indefinite time. Thereupon Madsen executed and delivered to the Spokane Grain Company the following order:

"August 10, 1905.

"Frederick & Nelson, City.

"Gentlemen:—Please pay to Spokane Grain Company at the end of each month the amount due me for boarding your

[1]Reported in 91 Pac. 570.

horses. Their receipt shall serve as a receipt from me. Pay them what will be due me for the month of August. Also pay them all moneys that will be due me each successive month until otherwise notified by the Spokane Grain Company.

"Yours very truly,
"Club Stables, by James Madsen, Proprietor."

Thereafter, up to August 29, 1905, the Spokane Grain Company sold and delivered to Madsen, hay and grain to the value of $451.50. During the month of August, 1905, Frederick & Nelson's bill with Madsen amounted to $440.90. The existence of the above-mentioned order was not known to Frederick & Nelson, and was not presented to them for acceptance and payment until August 31, 1905, at which time payment was refused for the reason that the amount due Madsen from Frederick & Nelson had been previously garnisheed in an action on a promissory note for $315.60, wherein E. B. McGill was plaintiff and Madsen was defendant. Madsen was afterwards, on September 6, 1905, declared a bankrupt, and E. B. McGill was appointed trustee in bankruptcy. Thereafter the Spokane Grain Company notified Frederick & Nelson not to pay to McGill as trustee in bankruptcy the money garnisheed in their hands. Frederick & Nelson thereupon filed a complaint in interpleader under the statutes, and upon paying into court the amount they owed Madsen, were released from liability. The case was then contested as to whether the trustee in bankruptcy or the Spokane Grain Company was entitled to the fund. The trial court held that the former was entitled to the money. From a judgment to that effect, this appeal is prosecuted by the Spokane Grain Company.

The appellant contends that the order set out above was not a draft or bill of exchange the acceptance of which is required to be in writing, but was an order drawn on a particular fund, covered the amount of the fund drawn upon, and amounted to an equitable assignment *in praesenti* of the fund, notwithstanding it had not been accepted by the drawee, and some au-

thorities are cited which apparently sustain this position. But our statute seems to place the question beyond controversy, for it provides:

"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same." Laws 1899, p. 362, §§ 126, 127.

These sections are plain, and it follows therefrom that the mere delivery of the order by Madsen to the Spokane Grain Company did not operate as an assignment of the funds in the hands of Frederick & Nelson, nor would Frederick & Nelson be liable on the order until it was accepted by them in writing. *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749; *Wadhams v. Portland etc. R. Co.*, 37 Wash. 86, 79 Pac. 597. This being true, it follows that the appellant had no title or claim upon the fund after it was garnisheed or paid into court by Frederick & Nelson. The judgment of the lower court must therefore be affirmed.

HADLEY, C. J., FULLERTON, CROW, RUDKIN, and DUNBAR, JJ., concur.

[No. 6571. Decided September 6, 1907.]

PORTLAND AND SEATTLE RAILWAY COMPANY, *Respondent*, v. CHARLES E. LADD *et al.*, *Appellants*.[1]

CONTINUANCE—ABSENCE OF PARTY. It is not an abuse of discretion to deny an application for a continuance on the ground of the absence of one of the parties holding a one-third interest in the property in dispute, where it does not appear that his testimony or presence was necessary at the trial.

EVIDENCE—DOCUMENTARY—MAPS. In a condemnation proceeding, maps showing the location of the railroad are admissible as illustrative of the evidence of the witnesses, where they are shown to be accurate by witnesses who had scaled the maps and compared them with the government field notes, although such witnesses had not surveyed the ground or made the maps.

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. In a condemnation proceeding the admission of improper maps as to the location of the road is harmless error, where there was no dispute as to the location, and the only question for the jury was as to the value of the land taken.

LIS PENDENS—EMINENT DOMAIN. Bal. Code, § 4887, authorizing the filing of a *lis pendens*, in all "actions affecting the title of real property," applies to condemnation proceedings, and subsequent purchasers are bound by the proceedings.

EMINENT DOMAIN—DAMAGES—TO PROPERTY NOT TAKEN—VALUE. In condemnation proceedings, where defendants claimed damages to land not taken valuable as a quarry, for the reason that the stone could not be profitably quarried without taking and throwing it down on the lands taken, and also, as the evidence showed, upon lands owned by the railroad company, the court properly instructed the jury that no damages could be allowed for the injury to the quarry if it could not be profitably worked except by throwing rock upon the lands already owned by the railroad company.

RUDKIN, J., dissenting.

Appeal from a judgment of the superior court for Skamania county, McCredie, J., entered August 20, 1906, on the verdict of a jury awarding damages in a condemnation proceeding. Affirmed.

[1]Reported in 91 Pac. 573.

Teal & Minor and *W. A. Johnson*, for appellants.

James B. Kerr and *George T. Reid*, for respondent.

MOUNT, J.—This appeal is prosecuted from a judgment based upon an award for damages in condemnation. The errors assigned will be considered and decided in the order assigned in appellants' brief. The facts necessary to an understanding of the points made will be stated as each point is considered.

It is first argued that the court erred in denying a motion for a continuance. The legal title of the land sought to be appropriated stood in the name of Charles E. Ladd and wife, but the equitable title was in Ladd and wife and the Columbia Contract Company, a corporation, in the proportion of one-third in Ladd and wife and two-thirds in the Columbia Contract Company. On June 8, 1906, a preliminary order was made in condemnation, adjudging the land sought by the railroad company a necessary public use, and ordering a jury to assess the damages in favor of the owners.

On June 21, 1906, notice was served on appellants' attorneys that a jury would be summoned for the 12th day of July, 1906, to determine the question of damages, and the jury was accordingly summoned for that day. On July 12, 1906, at the time fixed for the trial, a motion was filed by attorneys for Mr. Ladd, asking for a continuance of the trial upon the ground that Mr. Ladd was absent in some eastern state and was not advised of the time when the trial was to take place, and counsel could not locate him. The affidavit in support of the motion showed diligence of counsel in trying to locate Mr. Ladd; but there was no showing that counsel were dependent upon Mr. Ladd, or had relied upon him, to furnish evidence or the facts in the case, or that Mr. Ladd was a material witness, or that other witnesses were not at hand to fully establish all the facts upon which the appellants relied.

The granting or refusing of a continuance of a trial rests largely in the discretion of the trial court, and will only be

reviewed for abuse. *Maloney v. Stetson & Post Mill Co.*, 46 Wash. 645, 90 Pac. 1046. We are satisfied the court did not abuse its discretion in this case, because of the failure to show the facts above stated, and because the actual owners of an undivided two-thirds interest in the property were present. In fact, the pleadings show that the whole property was purchased by the Ladds and the Columbia Contract Company for use as a stone quarry, and that the same was to be operated by the appellant Columbia Contract Company, which company was present at the trial by its officers. There was therefore, no error in denying the motion for a continuance.

Appellants next contend that the court erred in receiving in evidence certain maps, marked exhibits A, B, D, and F, and in denying the motion to exclude these maps after they had been received in evidence. The points made are that the maps were not prepared by the engineers who made the surveys upon the ground, and also that the maps did not agree with themselves. There seems to have been no dispute in the evidence as to the exact location of the railroad line upon the ground, or of the amount of land sought to be appropriated, which was fifty feet on each side of the center line of the railway as staked upon the ground. The maps were not offered or received as evidence in themselves of the location of the line, but only as illustrative of the testimony of the witnesses testifying in relation thereto, and therefore were admissible, even though they were not made by the persons who made the surveys upon the ground, where they were shown to be accurate. 17 Cyc. 412. The witnesses who testified in regard to these maps all testified that the maps were accurate and showed the location of the line as laid out upon the land. It is true, these persons neither surveyed the ground nor made the maps, but they testified that they scaled the maps and compared them with the government and other field notes, and found them to be accurate. This was sufficient to entitle the maps to go in evidence as a part of the testimony of the witnesses.

It is true, one of the maps offered did not coincide with the others in all particulars, but this variance was explained so as not to mislead any one. But, if all the maps were improperly in evidence, it is difficult to see any prejudicial error, because there was no dispute as to the location of the railway line or the amount of land sought to be taken. The questions for the jury were, what is the value of the land taken, and the damage to the land not taken. Neither question was affected by the maps when the line was actually staked upon the ground and had previously been adjudged necessary for a public use. It is true, the appellants claim their land extended further east than was admitted by the respondent, and therefore gave them ninety or one hundred feet more land to the east of the base of Castle Rock, which appellants sought to show is a rock quarry which is greatly damaged by the construction of the railway line. But the evidence of appellants on this subject showed conclusively that the stone could not be quarried from Castle Rock profitably unless the stone was thrown by a blast a distance of from two to four hundred feet beyond the appellants' line, even if the east line were located one hundred feet further east than the line claimed by respondent. The exact location of this line is therefore immaterial, because in any event the quarry could not be profitably operated without destroying property which appellants did not own and could not acquire.

Appellants next contend that the court erred in giving the following instruction:

"If the petitioner commenced a suit to appropriate a right of way across the Snooks Donation Land Claim and filed its *lis pendens* thereof in the auditor's office in Skamania county, Washington, and subsequent thereto claimants obtained an option or agreement to purchase a part of said Donation Land Claim, through which said proposed road extends, and subsequent thereto said case came on to be heard, and the damages were assessed and paid, and the right of way appropriated by the petitioner, then the petitioner is the owner of said right of way and claimants' said right to purchase is subsequent and subordinate thereto."

The trial court was evidently of the opinion that § 4887 of the practice act, Bal. Code (Pierce's Code, § 343), relating to the manner of commencing actions applies to cases of this character. It is argued by appellants that proceedings in condemnation are special proceedings, and therefore that § 4887, which relates to the filing of a *lis pendens* in actions affecting the title to real property, does not apply to this class of cases. We are of the opinion that the section does apply to cases of this kind. While it is true that proceedings in condemnation are special in this state, and are therefore governed by all the requirements stated in the statute, yet where no provision is made for the protection of parties to such proceedings, the rules of common practice must necessarily apply. The statutes relating to the exercise of the right of eminent domain provide, at § 5637, Bal. Code (Pierce's Code, §5102), that any corporation authorized to appropriate land may present to the superior court of the county where the land is located, a petition describing the land sought, and setting forth the name of each owner, incumbrancer, or other person interested in the land, "so far as the same can be ascertained from the public records." The record owners or incumbrancers are therefore the only parties made necessary by this statute. The next section provides that a certain notice "shall be served on each and every person named therein as owner, incumbrancer, tenant, or otherwise interested" in the land. No provision is made in the act for the service of notice upon incumbrancers or purchasers of the land after the proceedings are begun. It is, no doubt, required that tenants or persons in possession are required to be served with notice; but incumbrancers or purchasers with notice after the proceedings are begun are, of course, bound by the record and take subject thereto.

In *In re Smith's Petition*, 9 Wash. 85, 37 Pac. 311, 494, this court said:

"It has been frequently said by courts that the taking of land by eminent domain is a proceeding *in rem*, and the ser-

vice of a constructive notice has been justified by the practice which prevails in that class of cases. But it is well known that proceedings *in rem* presuppose that the complaining party has a superior right to the subject of the suit, or a right to have it subjected to his claim, and that the first requisite is a seizure of the thing itself, after which follows notice. 'The theory of the law is that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him.' *Windsor v. McVeigh*, 93 U. S. 274."

It follows, of course, if these proceedings are *in rem*, subsequent purchasers are bound by the proceedings pending, and are bound to take notice thereof where possession is taken *prima facie* by staking the line upon the ground, as was the fact here. It is conceded by appellants that, in some states where there is no statute regarding *lis pendens*, the courts have held that one who purchases land after the proceedings are commenced takes subject to the proceedings. 2 Pomeroy, Equity Jurisprudence (2d ed.), § 632 *et seq.*; 2 Lewis, Eminent Domain, 338.

But it is argued that the common law rule is repealed by § 4887, which does not apply to this class of cases. Either the statute or the common law rule, one or the other, must be in force as regards this class of cases because, as seen above, no provision in reference thereto is made by the statute relating to eminent domain. We think the legislature used the term "actions affecting the title of real property," as applying to all actions and proceedings relating to such property, and for that reason made no provision in the eminent domain act for notice to purchasers or subsequent incumbrancers pending the suit. The giving of this instruction was therefore not error.

Appellants allege further that the court erred in giving the following instruction:

"You are instructed that if you find from the evidence that Castle Rock can only be profitably worked by blasting it in such a manner that portions of it would fall upon land now

owned by the railroad company, then you may disregard all the evidence of value as a quarry. The owners of Castle Rock are by law required, if they desire to quarry the same, to so quarry their rock as not to interfere with the rights of others. If you find from the evidence that petitioner herein owns a right of way across the Snooks Donation Land Claim and up to the land of defendants, then it is the duty of the defendants or claimants to quarry the rocks so as not to interfere or trespass upon this right of way, and you are not to consider the inability of defendants or claimants to use this right of way on the Snooks Donation Land Claim as an element of defendants' damages whereby the property not taken by this action is damaged. The damage you are to consider is confined to that which arises and naturally flows from the appropriation of the land for a right of way across defendants' land, which is sought by this suit."

The evidence shows that the right of way of the railway runs close to the base of a large rock, several hundred feet in height, the exact measurement not being shown, known as "Castle Rock;" that one face of this rock is toward the Columbia river, which is four or five hundred feet distant from the rock; that the railway runs between the rock and the river; that the appellants did not own all the land between the river and the rock; a large portion thereof was owned by the railway company. There was apparently no dispute that the land of the appellants sought by the railway company was not worth to exceed $50 per acre for agricultural purposes. The appellants claim that the land taken by the railway was a great damage to other lands of appellants not taken, by reason of the fact that Castle Rock was valuable as a stone quarry, because it contained about eighteen million tons of stone, and that the construction of the railway prevented appellants from quarrying the stone at a profit. The great burden of appellants' evidence was to the effect that, in order to work the rock, known as Castle Rock, at a profit, it was necessary to blast down great quantities of the rock at a time and throw the same toward the river. Otherwise the property could not be worked at a profit, and was therefore of no value.

This same evidence showed without question that, in order to do this, the rock would be piled high upon lands which appellants did not own, and could not acquire because such lands were already owned by the railway company. It requires no argument to show that, if appellants' property was so situated that it could not be utilized without injury to others, its use would not be permitted at all; and if the value of appellants' property was dependent upon other property which they did not own and could not acquire, then as shown by the appellants themselves, the property had no value and, of course, was not damaged. We think the instruction was proper in this case.

The verdict and award of damages in this case was $5,000. Appellants contend that this amount is too small, and that a new trial should be granted on that account. After a careful reading of all the evidence in the case, we are satisfied that the appellants have no good reason to complain on this account, and that a much smaller award would have been sustained.

The questions presented which we have not noticed are either decided by what we have said above, or are not deemed of sufficient importance to warrant a reversal.

We find no reversible error in the record, and the judgment is therefore affirmed.

HADLEY, C. J., ROOT, CROW, and DUNBAR, JJ., concur.

RUDKIN, J. (dissenting)—I do not think that the mere fact that a stone quarry cannot be profitably worked at the present time without blasting and casting rock on the property of others, entirely destroys its value as such, and I therefore dissent from the judgment.

[No. 6588. Decided September 6, 1907.]

SAMUEL R. STERN, *Respondent*, v. R. T. DANIEL, *Appellant*.[1]

EVIDENCE—LETTERS—ADMISSIBILITY—ATTORNEY AND CLIENT. In an action for professional services, letters showing that the services were rendered are not inadmissible for the reason that they showed the defendant to be engaged in leasing houses for immoral purposes and the reflection upon his character might prejudice the jury against him.

WITNESSES—PRIVILEGED COMMUNICATIONS. Letters from a client to an attorney are not privileged as between themselves, where the client charges mismanagement of the cause and to enforce the privilege would deprive the attorney of the means of obtaining his rights.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered June 11, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover for professional services. Affirmed.

A. E. Barnes and *Geo. A. Latimer*, for appellant.

Horace Kimball and *Samuel R. Stern*, for respondent.

MOUNT, J.—Respondent brought this action to recover from appellant for the value of services rendered as an attorney and counselor for appellant between July 1, 1903, and January 1, 1906; and also for disbursements alleged to have been made for appellant on account of certain cases then pending in court. The trial was to a jury, and resulted in a verdict in favor of respondent in the sum of $1,000. The court denied a motion for a new trial and entered a judgment on the verdict in favor of respondent in the sum of $1,000. The defendant appeals.

The complaint alleged the value of the services to be the sum of $2,305, and the amount of disbursements to be $795.32, making a total of $3,100.32. On this total the com-

[1]Reported in 91 Pac. 552.

plaint alleged payments by the respondent amounting to $1,422.25. The answer admitted the employment of the respondent by the appellant, but denied that the services performed by the respondent were of the value alleged in the complaint, and admitted the payment of $1,422.25, which it is alleged fully paid respondent for his services and disbursements. The answer also alleged three affirmative defenses, substantially as follows: (1) That respondent needlessly expended the sum of $496.92 in the defense of Wright v. Daniel, which the respondent should have known was a useless waste of money; (2) that in the case of Wright v. Daniel, owing to the unskillful manner in which respondent defended said case, it became necessary for appellant to employ other counsel, at an expense of $350, to assist respondent therein; (3) that in the case known as the "Pattee" case, appellant was also required to employ other counsel at an expense of $400, on account of the unskillfulness of respondent.

Because there was no evidence to support these three affirmative defenses, they were each taken from the consideration of the jury. It is claimed by the appellant that the court erred in not granting a new trial, because (1) of insufficiency of the evidence to justify the verdict; (2) the jury was prejudiced against the appellant; (3) the fees were excessive upon their face, and because certain exhibits were erroneously allowed in evidence. A cursory reading of the plaintiff's testimony discloses that there is ample evidence to justify the verdict, if the jury believed it, which they evidently did, and we find nothing in the amount of the verdict to justify the contention that the jury were prejudiced against the appellant.

The complaint prayed for a balance of $1,678. There was evidence to support the judgment for this amount. But the jury found for but $1,000, which was, in our opinion, a conservative finding. There was evidence in the case which may have had a tendency of prejudice against appellant. For example, letters which were written to respondent by the appel-

lant were introduced in evidence. These letters showed that appellant was engaged in leasing buildings for immoral purposes. But these letters were admissible to show that respondent had rendered services to the appellant in the way of advice and consultation in regard thereto, for which respondent was entitled to recover. The mere fact that these letters reflected upon the business or character of appellant was not sufficient reason for excluding them. If they were prejudicial on this account, that prejudice is not manifest in the verdict rendered.

It is also claimed that these letters were privileged, and that the court erroneously admitted them. They would have been privileged, no doubt, as between either of the parties to this suit and third parties, but as between the attorney and client the rule of privilege will not be enforced where the client charges mismanagement of his cause by the attorney, as was the case here, and where it would be manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of the attorney, or when it would be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. 23 Am. & Eng. Ency. Law (2d ed.), p. 79; *Mitchell v. Bromberger*, 2 Nevada 345, 90 Am. Dec. 550. It was therefore not error to allow these letters in evidence.

It is also argued that the court erred in permitting certain hypothetical questions proposed to attorneys as witnesses upon the question of the amount of reasonable fees. The questions as finally permitted were, we think, in accordance with the plaintiff's evidence and supported by it, and therefore were not erroneous.

We find no reversible error in the record. The judgment must therefore be affirmed.

HADLEY, C. J., CROW, FULLERTON, RUDKIN, DUNBAR and ROOT, JJ., concur.

[No. 6604. Decided September 6, 1907.]

W. W. POWERS, *Appellant*, v. EDWARD E. WEBSTER *et al.*, *Respondents*.[1]

PUBLIC LANDS—CANCELLATION OF DEED—PARTIES. An action to cancel a deed of state lands cannot be maintained by a person who has no interest in the property, as the state is a necessary party plaintiff where the land reverts to the state.

SAME—INTEREST OF PRIVATE CITIZEN. A private citizen, who was fraudulently prevented by state officers from bidding at a sale of state lands, has no such interest in the lands as to entitle him to maintain a suit to cancel the deed from the state, as he could not require it to be resold.

SAME—TAXPAYER. A taxpayer cannot maintain a suit to cancel a deed fraudulently made by state officers, as he suffers no injury different from that suffered by the public at large.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 10, 1906, dismissing an action to set aside and cancel a deed of state lands, upon sustaining a demurrer to the complaint. Affirmed.

Million & Houser, for appellant.
The Attorney General, for respondents Ross and Atkinson.
Shank & Smith, for respondents Webster.
McBride, Stratton & Dalton, for respondents Croft.

MOUNT, J.—The appellant brought this action to set aside a sale of school lands, to cancel a deed therefor, executed by the state to respondent Croft, and to compel the respondent Ross, the state land commissioner, to re-offer the land for sale. The lower court sustained a demurrer to the amended complaint, upon the grounds that the court had no jurisdiction, plaintiff had no legal capacity to sue, there is a defect of parties, and that the complaint fails to state facts sufficient

[1]Reported in 91 Pac. 569.

to constitute a cause of action. The plaintiff refused to plead further, and the action was dismissed.

The complaint alleges, in substance, that the state has been, and now is, the owner of the school land in question, being ten acres situate in King county; that prior to June, 1906, Joseph I. Croft was in possession of the land under a lease, and had a sawmill thereon of the value of $1,000 and no more; that on June 1, 1906, said Croft applied to the state board of land commissioners for appraisement and sale of the lands, and thereafter the land was appraised at $350 per acre, and ordered sold; that thereafter certain of the defendants and E. W. Ross, land commissioner, entered into a conspiracy to obtain said land at less than its real value; that in pursuance of that conspiracy, said Ross caused the appraisement to be reduced to $100 per acre, and fraudulently caused the sawmill thereon to be appraised at $5,453.34; that said land at said time was worth $1,000 per acre, exclusive of the improvements; that on June 30, 1906, at the time and place where the sale was fixed, the plaintiff and certain of the defendants appeared and the land was offered for sale by the deputy auditor of King county where the land was located; whereupon Joseph I. Croft bid the sum of $6,453.34, the amount of the appraised value as reduced as aforesaid; that thereupon the respondent Raymond made a bid of $14,453.34, and there being no other bids, the land was struck off to said Raymond; that said Raymond fraudulently refused to make payments upon his bid, and thereafter the said Ross fraudulently and unlawfully reported the sale of said land to said Joseph I. Croft, for the sum of $1,000, and induced the governor and secretary of state to issue a patent for said land to said Croft; that said bid of said Raymond was a fraudulent bid for the purpose of preventing the plaintiff from bidding at said sale; that said Ross knew that the interests of the state had been injuriously affected by fraud and collusion, and that said Croft was not the highest bidder at said sale; that the defendants knew that plaintiff was desirous of bidding on said

property at said sale, and was present with $10,000 to bid for said land, but was prevented from bidding by the conduct of said Raymond, who was in collusion with the other respondents; that appellant had no knowledge of the conspiracy or fraudulent acts of respondents, and therefore filed no affidavit with the commissioner of lands setting forth fraud or asking for a resale; that if said land is offered for resale, plaintiff will bid $10,000 therefor; that plaintiff has demanded of the attorney general that he bring an action to set aside said sale, but the attorney general refuses to do so; that plaintiff is a resident and taxpayer of King county, and will suffer irreparable injury if defendants are permitted to retain said land, and brings this action as a taxpayer and as an intending buyer and on behalf of others similarly situated.

The trial court properly sustained the demurrers. The first object of the action is to set aside the deed from the state to respondent Croft. If the deed of the state is set aside the property reverts to the state. Therefore the state is a necessary party to such an action. The action cannot be maintained at the suit of a private person who has no interest in the property. *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Welsh v. Callvert*, 34 Wash. 250, 75 Pac. 871; *Horsky v. Moran*, 21 Mont. 345, 53 Pac. 1064; *Tacoma v. Bridges*, 25 Wash. 221, 65 Pac. 186; *State ex rel. Shores v. Ross*, 44 Wash. 246, 87 Pac. 262.

In the case of *St. Louis Smelting Co. v. Kemp, supra*, the court said:

"If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess

such equities as will control the legal title in the patentee's hands. *Boggs v. Merced Mining Co.*, 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

If the patent may be avoided for fraud, the appellant has no interest in the land except as a citizen of the state. When the deed of the state is set aside the land reverts to the state. The appellant cannot even require the land to be resold, because the power of resale rests in the discretion of the board of state land commissioners. *State ex rel. Bussell v. Bridges*, 30 Wash. 268, 70 Pac. 506; *State ex rel. Pelton v. Ross*, 39 Wash. 399, 81 Pac. 865. Nor can appellant maintain the action as a citizen and taxpayer. *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067; *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37; *Tacoma v. Bridges, supra; State ex rel. White v. Point Roberts Reef Fish Co.*, 42 Wash. 409, 85 Pac. 22; *State ex rel. Shores v. Ross, supra.*

In the case of *Tacoma v. Bridges, supra*, this court said:

"Whatever may be the rule elsewhere, it is the rule in this state that a taxpayer and citizen suing in a private capacity cannot maintain a suit to enjoin a state officer from committing a breach of his public duty, without showing that he would suffer an injury thereby differing in kind from that suffered by the public at large."

And in *State ex rel. Shores v. Ross, supra*, we said:

"If the deed to these tide lands had been delivered after the respondent was reliably informed that the application and bidding were fraudulent, to the detriment of the state, it would be the duty of the respondent (commissioner of public lands) or of some official of the state to immediately cause an action to be brought to cancel said deed, and to recover the property, title to which was thus fraudulently acquired."

See, also, 26 Am. & Eng. Ency. Law (2d ed.), pp. 395-6-7.

The complaint, having shown that the appellant has no special interest in the lands, and not being authorized to main-

tain the action as a taxpayer, fails to state a cause of action. The judgment is therefore affirmed.

HADLEY, C. J., CROW, ROOT, RUDKIN, and DUNBAR, JJ., concur.

[No. 6637. Decided September 6, 1907.]

BETSY P. GRUBB, *Respondent*, v. JAMES STEWART *et al.*, *Appellants*.[1]

USURY—PLEADING—NECESSITY. The defense of usury cannot be raised unless it is pleaded, especially where it does not appear on the face of the record.

SAME—DEFENSES—PERSONS ENTITLED. The defense of usury is personal to the parties and cannot be set up by strangers who were not creditors and who took property from one of the parties subject to and with notice of an alleged usurious transaction, which created a lien on the property.

Appeal from a judgment of the superior court for Clallam county, Hatch, J., entered May 5, 1906, after a trial before the court without a jury, declaring a lien upon lots for taxes paid, in an action brought to recover an interest in land. Affirmed.

Graves, Palmer & Murphy and *James Stewart*, for appellants.

Trumbull & Trumbull, for respondent.

MOUNT, J.—On the 5th day of January, 1899, the United States Savings and Loan Company, a corporation located at St. Paul, Minnesota, entered into a contract with the Pacific and Oriental Investment Company, a corporation located at Port Angeles in this state, to sell to the last named corporation lot 3, in block 13, of the town of Port Angeles, for a consideration of $1,700. According to the terms of this con-

[1]Reported in 91 Pac. 562.

tract, $425 was to be paid in cash upon delivery of the contract, and thereupon possession of the property was to be delivered to the purchaser. Four hundred and twenty-five dollars was to be paid on or before January 1, 1900, and like amounts on January 1, 1901 and 1902. The deferred payments were to bear interest at eight per cent per annum, and the purchaser was to keep the improvements on the premises insured and the taxes, etc., paid. Time was made the essence of the contract, and in case of noncompliance by the purchaser, all payments thereon were to become forfeited to the selling corporation. This first payment upon this contract was made by Mrs. Grubb, the respondent in this case, and thereupon she and the investment company entered into the following agreement:

"Port Angeles, Washington, March 28, 1899.

"To whom it may concern:—This is to certify that the sum of four hundred and twenty-five dollars ($425) has been paid by Mrs. Betsy Grubb, of the city of Port Angeles, Washington, as first payment of purchase of lot three (3), block thirteen (13) of the original government townsite of Port Angeles, with the buildings thereon. And the agreement of sale made to the Pacific and Oriental Investment Company by the United States Savings and Loan Company is held in trust by the said Pacific and Oriental Investment Company for the said Mrs. Betsy Grubb upon the following conditions, to wit: The said Pacific and Oriental Investment Company to have and to hold possession of said property for the term of one year from January 1, 1899, in consideration of said company paying taxes for the year 1898 and paying interest and insurance on same. And it is further expressly agreed and understood that should the said Pacific and Oriental Investment Company at any time during the year 1899, or up to the 4th day of January, 1900, pay the said Mrs. Betsy Grubb the sum of seven hundred dollars ($700) gold coin, then the said Mrs. Betsy Grubb relinquishes all claim to said property and vests the title in the Pacific and Oriental Investment Company."

This contract was duly signed and acknowledged. On December 26, 1899, Mrs. Grubb sought advice from appellant

Stewart, who was then a practicing lawyer in Port Angeles, as to what she should do in case the Pacific and Oriental Investment Company should fail to pay the $700 named in said contract on or before January 4, 1900. Mr. Stewart advised her, and drafted a letter to be sent to the United States Savings and Loan Company at St. Paul, notifying that company of the interest of Mrs. Grubb in the contract of sale. This letter was accordingly sent and receipt thereof acknowledged by the Savings and Loan Company. Thereafter on January 5, 1900, the trust agreement was placed of record in Clallam county, where the land was located, but thereafter no payment of the sum of $700, or any part thereof, was made to Mrs. Grubb. The Pacific and Oriental Investment Company subsequently, up to the year 1902, paid the United States Savings and Loan Company on the purchase price of the lots about $800 in principal and interest, besides the first payment above named; but notwithstanding payments were not made as agreed to in the contract, no forfeiture was claimed.

On the 11th day of July, 1902, the Pacific and Oriental Investment Company, in consideration of $10, assigned its contract of purchase to the respondent Stewart, and the assignment was approved by the Savings and Loan Company. Mr. Stewart thereafter completed the payments due on the original contract and, on July 14, 1903, took title in himself from the United States Savings and Loan Company. Thereafter on November 26, 1904, Stewart conveyed the premises to the appellants Nellie Mastick and husband, for an alleged consideration of $1,800, and took a mortgage back for $1,300. Thereafter this action was begun by respondent, alleging that she was the equitable owner, and praying that the appellants be decreed to hold the legal title in trust for her. She did not offer to repay Stewart the money he had advanced on the purchase price of the lots. The appellants answered, alleging, in short, that the $425 advanced by respondent to the Pacific and Oriental Investment Company was advanced as a loan, and that the same had been fully paid, and if not paid, was barred

by laches. The trial court found that the amount advanced; viz., $425, to the Pacific and Oriental Investment Company, was a loan, and that the trust agreement amounted to a lien on the lot for said sum of $425, with interest at seven per cent, and ordered the property sold to satisfy this claim, provided the amount was not paid by the appellants within sixty days. This appeal is prosecuted from that judgment.

The principal point contended for by the appellants is that the contract between respondent and the Pacific and Oriental Investment Company was usurious, and for that reason the principal should have been reduced by the amount of usurious interest contracted for under Bal Code, § 3671. It is not necessary for us to decide the question whether the contract between respondent and the Pacific and Oriental Investment Company, as set out above, was usurious, because the appellants cannot be permitted to raise this question in this case, for two reasons. First, the defense of usury was not pleaded in the answer. "When usury is relied upon as a defense, it must be pleaded," *Brundage v. Burke*, 11 Wash. 679, 40 Pac. 343, especially where usury does not appear upon the face of the record.

Second, the appellants acquired the property with full notice, both actual and constructive, of the claim of the respondent. The deed from the United States Savings and Loan Company to Mr. Stewart recited that it was made "subject to any liability which may arise by reason of anything which may have been done by the parties under the contract issued to the Pacific and Oriental Investment Company, or any one claiming under them, and by reason of which contract this conveyance is made to the second party as assignee thereof." The appellants were not creditors, nor in any way in privity with the Pacific and Oriental Investment Company, the debtor of the respondent, and therefore could not plead the defense of usury, because such defense is personal to the debtor or his privies, and cannot be set up by a stranger. 29 Am. & Eng. Ency. Law (2d ed.), p. 534; 2 Current Law,

p. 1766; *Lamoille County Nat. Bank v. Bingham*, 50 Vt. 105, 28 Am. St. 490, and authorities cited in note to page 491.

Under the facts stated above, which are substantially undisputed, we are satisfied the judgment was right. It is therefore affirmed.

HADLEY, C. J., CROW, FULLERTON, and DUNBAR, JJ., concur.

[No. 6710. Decided September 6, 1907.]

EPHRAIM WRIGHT, *Respondent*, v. COMPUTING SCALE COMPANY *et al.*, *Appellants*.[1]

SALES—BREACH OF WARRANTY—DEFENSES—CONTRACTS—CITY ORDINANCE AS PART OF CONTRACT. In an action upon a warranty of computing scales that it would weigh correctly, to recover losses sustained by reason of false weights, which were not discovered until inspection by a city inspector, an ordinance of the city forbidding the use of any weight or scale until the same is inspected, is a defense to the action, as the ordinance becomes a part of the contract.

SALES—BREACH OF WARRANTY—DAMAGES. The measure of damages upon breach of a warranty that scales will weigh correctly is the sum paid therefor, and does not include losses by reason of false weights, where a city ordinance prohibited the use of any weight or scale until the same was inspected by a city inspector, and such an inspection, or ordinary care on the part of the purchaser, would have disclosed the defect in the scales.

Appeal from a judgment of the superior court for Spokane county, Gilliam, J., entered September 13, 1906, upon findings entered in favor of the plaintiff, in an action for breach of warranty. Reversed.

J. W. Graves and *A. G. Gray* (*Post, Avery & Higgins*, of counsel), for appellants.

Willis H. Merriam, for respondent.

[1]Reported in 91 Pac. 571.

MOUNT, J.—The respondent brought this action in the court below to recover damages for an alleged breach of warranty of a set of scales for weighing meats. The cause was tried to the court without a jury, and findings and a judgment were entered for the plaintiff as prayed for. Defendants appeal.

Upon the trial the court found the facts substantially in accordance with the allegations of the complaint, the material findings being as follows:

"(2) That on the 2d day of December, 1903, the plaintiff purchased from the defendants, through their authorized agent at the city of Spokane, Washington, one computing scale at the agreed price of $85; that at the time of said purchase the defendants, as a part of the contract of said purchase, guaranteed the plaintiff in writing that said scale would weigh correctly any article capable of being weighed upon it, which contract of guarantee is shown in plaintiff's exhibit No. E."

This exhibit is as follows:

"Received from Robert Trumbull, 103 S. Howard, $15, as cash payment on one 63-scale, balance of $70 to be paid at the rate of $7 per month, without interest, or a discount of ten per cent of balance will be allowed if balance is paid within thirty days of date hereof.

"Guaranty: The Computing Scale Co., of Dayton, O., manufacturers of the Moneyweight Scale, together with the Moneyweight Scale Co., of Chicago, do hereby guarantee said computing scale to weigh correctly any article capable of being weighed on it, and should the scale get out of order at any time within two years from the date of shipment, with ordinary use (not dropped or broken), we will repair the same gratis, the purchaser paying the freight or express charges to and from the factory. Money Weight Scale Company, by T. Delafield, salesman.

"(3) That on the 2d day of December, 1903, the said scale was delivered to plaintiff by the defendants and the plaintiff paid the defendants on the purchase price thereof the sum of $43.

"(4) That the plaintiff bought said scale for the special purpose of using it in his place of business, to wit: a meat

market situated in the city of Spokane, Washington, which purpose was known to the defendants, and plaintiff began to use it immediately upon the delivery and continued to use it down to the 24th day of March, 1904, and during the time between the said 2d day of December, 1903, and the 24th day of March, 1904, caused to be weighed upon said scale 2768 sales of beef, 852 sales of pork, 401 sales of mutton, 343 sales of veal, 342 sales of sausage, 75 sales of bacon, 153 sales of ham, 205 sales of poultry, 47 sales of weinnerwurst, 92 sales of liver, 45 sales of head cheese, 145 sales of fish, and 158 sales of lard, relying at all times during said period on the guarantee of the defendants that said scales would weigh correctly.

"(5) That said scale was, in fact, defective at the time it was delivered to plaintiff on account of being improperly constructed, and remained defective and did not at any time between the dates of December 2, 1903, and 24th day of March, 1904, weigh correctly any article that was weighed upon it, and in fact, on account of such defect and improper construction the said scale weighed each and every article weighed upon it at one-half pound less than its true weight, resulting in a loss to the plaintiff on account of such defects, on every article weighed the value of a half a pound of the article weighed.

"(6) That on the 24th day of March, 1904, the aforesaid scale was inspected by the inspector of weights and measures of the city of Spokane, Washington, and said inspector found that the said scale was defective and weighed every article that had been weighed upon it one-half pound less than its true weight, and he, therefore, condemned the said scale and the plaintiff was prohibited from using said scale by said officer.

"(7) That the plaintiff had no knowledge that said scale was defective or was not weighing correctly until the 24th day of March, 1904, when it was inspected, and that he immediately thereafter notified said defendants of said defects, and the defendants removed the said scale from plaintiff's place of business, but failed and refused to pay to plaintiff the $43 plaintiff had paid to them on account of the purchase price of said scale, or to pay plaintiff the amount of the losses he sustained on account of said defects in said scale."

The court then found the prices at which the beef, etc., were sold, and concluded that plaintiff should recover $43 paid for the scale and $338 losses sustained by the underweight of the scales. In the answer the defendants pleaded, as an affirmative defense, a city ordinance of the city of Spokane in force at the time the contract was made, making it unlawful for any person to use any weight or scale used in weighing articles for sale without first having procured a certificate from the city inspector of weights and measures that such scales had been inspected and found correct; that the contract of warranty was made with reference to said ordinance, and that plaintiff failed and neglected to have said scale inspected. The defense was stricken by the court upon motion of the plaintiff.

It was error, without doubt, to strike this defense. The law of the place where a contract is made is as much a part of the contract as though it were expressed therein. 9 Cyc. 582, and cases cited; *Holbrook v. Ives*, 44 Ohio St. 516, 9 N. E. 228. There was nothing in this defense which in any way tended to vary or contradict the terms of the written contract. The warranty was, defendants "do hereby guarantee said computing scale to weigh correctly." This certainly did not imply that the scale had been tested and adjusted by the city inspector and his certificate issued to that effect. It was the duty of the plaintiff, under the law, to have an inspection made by that officer before the plaintiff was authorized to use the scale. If he had done so, the scale would have been condemned and he could have rescinded the sale and recovered his money back before any loss had accrued to him. This was clearly his duty and his remedy. Furthermore, the rule in construing contracts of this kind is:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such

breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it." 30 Am. & Eng. Ency. Law (2d ed.), p. 209.

See, also, *Puget Sound Iron & Steel Works v. Clemmons*, 32 Wash. 36, 72 Pac. 465. It is unreasonable to suppose that the contract of warranty above set out contemplated that the appellant should be liable for mistakes and underweights for a period of four months and for more than five thousand sales. Such damages did not arise naturally, nor were they in contemplation of the parties when the contract was made. But, conceding that there was a breach of warranty and that respondent was entitled to some damages,

"The buyer owes an active duty to exercise ordinary care in order to render the damages arising from the breach of warranty as light as possible; he cannot recover for expenses or losses unnecessarily incurred, nor for any damages of which his own negligence was the proximate cause. If by the exercise of ordinary care the damages might have been prevented, the measure of the buyer's recovery is the reasonable cost and expense of exercising such care, whether he exercised it or not." 30 Am. & Eng. Ency. Law (2d ed.), 223.

Ordinary care would have discovered the error in these scales before they were used at all. A mere compliance with the city ordinance would have discovered the error. In either view of the case, upon the facts found, the plaintiff was entitled to recover back only the money he had paid on the purchase price.

The judgment is therefore reversed and the cause remanded with instructions to enter a judgment in favor of the respondent for $43. The appellants are allowed their costs of this appeal.

HADLEY, C. J., CROW, FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, J.—I concur on the second ground stated in the opinion.

[No. 6753. Decided September 6, 1907.]

NELLIE M. GRANT *et al.*, *Plaintiffs and Appellants*, v. SPOKANE TRACTION COMPANY, *Defendant and Appellant*.[1]

TRIAL—VERDICT—SPECIAL FINDINGS—CONSISTENCY WITH GENERAL VERDICT — CARRIERS — NEGLIGENCE IN SETTING DOWN PASSENGERS. Where the complaint alleged the negligent starting of a street car while plaintiff was in the act of alighting, and that "at or about the time" plaintiff had one foot upon the steps of the car and one foot upon the pavement, a special finding by the jury that plaintiff had both feet on the steps, does not negative a general verdict for plaintiff, since it does not negative negligence of the defendant in starting the car while plaintiff was in the act of alighting; and since a construction of the special verdict should be adopted to sustain the verdict if it is susceptible thereof.

WITNESSES—CROSS-EXAMINATION. In a personal injury case, upon cross-examination of plaintiff's husband, who was commonly called "doctor" and who had given to the conductor his address with a handbill advertising his treatment, it is proper to allow questions as to whether witness was a regular physician, and whether he had given treatment to his wife.

Cross-appeals from a judgment of the superior court for Spokane county, Gilliam, J., entered December 1, 1906, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits. Affirmed.

Danson & Williams, for plaintiffs.

Graves, Kizer & Graves, for defendant, to the point that plaintiffs could not allege one state of facts and recover from another, cited: *Caven v. Troy*, 15 App. Div. 163, 44 N. Y. S. 244; *Wainwright v. Interurban St. R. Co.*, 48 Misc. 645, 96 N. Y. Supp. 114; *Birmingham Elec. R. Co. v. Clay*, 108 Ala. 233, 19 South. 309; *Shepard v. New Haven etc. R. Co.*, 45 Conn. 54; *Chicago etc. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921; *Augusta R. & Elec. Co. v. Weekly*, 124 Ga. 384, 52

[1]Reported in 91 Pac. 553.

S. E. 444; *Politowitz v. Citizens' Telephone Co.*, 115 Mo. App. 57, 90 S. W. 1031; *Louisville & N. R. Co. v. Wade*, 46 Fla. 197, 35 South. 863; *Atchison etc. R. Co. v. Owens*, 6 Kan. App. 515, 50 Pac. 962; *East Tennessee Coal Co. v. Daniel*, 100 Tenn. 65, 42 S. W. 1062; *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 28 S. E. 733, 64 Am. St. 922, 39 L. R. A. 499; *Hamilton v. Metropolitan St. R. Co.*, 114 Mo. App. 504, 89 S. W. 893; *Bond v. Chicago etc. R. Co.*, 110 Mo. App. 131, 84 S. W. 124; *Patterson v. Westchester Elec. R. Co.*, 26 App. Div. 336, 49 N. Y. Supp. 796; *Kuhlman v. Metropolitan St. R. Co.*, 30 Misc. Rep. 417, 62 N. Y. Supp. 466; *Coleman v. Metropolitan St. R. Co.*, 81 N. Y. Supp. 836; *McAllister v. People's R. Co.*, 4 Pen. (Del.) 272, 54 Atl. 743; *Higgins v. Wilmington*, 3 Pen. (Del.) 356, 51 Atl. 1; *Murphy v. North Jersey St. R. Co.*, 71 N. J. L. 5, 58 Alt. 1018; *Ebsary v. Chicago City R. Co.*, 164 Ill. 518, 45 N. E. 1017; *Arcade File Works v. Juteau*, 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326.

MOUNT, J.—Action for personal injuries. The plaintiff Nellie M. Grant was injured while alighting from a street car operated by defendant. The cause was tried to a jury. A general verdict for $1,700 was returned in plaintiffs' favor. Special interrogatories were submitted to the jury at defendant's request, and were answered by the jury as follows:

"(1) Was the plaintiff Nellie M. Grant standing with both feet on the steps of the car when it started? Ans. Yes. (2) If so, did she attempt to get off or did her husband, B. M. Grant, pull her off after the car had started and while it was in motion? Ans. She attempted to get off and was assisted by her husband. (3.) Was the plaintiff Nellie M. Grant standing with one foot on the step and one on the pavement and in the act of getting off when the car started? Ans. No."

Thereafter the defendant moved the court for a judgment notwithstanding the general verdict, and the plaintiffs moved

for a new trial. Both motions were denied and a judgment was entered upon the general verdict. Both parties to this action have appealed.

The defendant contends that the special findings are inconsistent with the general verdict, and therefore control it, and plaintiffs contend that the court erred in permitting certain cross-examination of the plaintiff B. M. Grant, while he was a witness in behalf of plaintiffs. The complaint alleged that "the defendant's said car was stopped by said defendant for the purpose of permitting plaintiff Nellie M. Grant and other passengers to alight from said car, and thereupon plaintiff Nellie M. Grant proceeded by invitation of said defendant to alight from said car while it was motionless, and while so in the act of alighting from said car, and at or about the time said plaintiff placed one foot upon the street while the other foot was upon the step of said car, said defendant carelessly and negligently started said car and dragged said plaintiff Nellie M. Grant for a short distance, finally throwing her violently to the ground," thereby injuring her. Plaintiffs' evidence substantially conformed to these allegations; but the jury found by the special findings above quoted that, at the time the car started, the plaintiff Mrs. Grant was standing with both feet on the steps of the car, and one foot was not on the steps and the other on the pavement.

Defendant contends upon these special findings that the jury found against the case alleged in the complaint, but permitted recovery upon another state of facts. A number of cases are cited to the effect that a plaintiff cannot allege one state of facts and recover upon another, and this contention, thus broadly stated, is no doubt the rule (*Albion v. Seattle Electric Co.*, 40 Wash. 51, 82 Pac. 145); but the negligence alleged here is that the car was motionless, and that the defendant carelessly started the car *while plaintiff was in the act of alighting* therefrom, "and *at or about the time* said plaintiff had placed one foot upon the street while the other foot was upon the steps of said car." This last clause served

to fix the time and position of the plaintiff when the car was started. It did not fix either exactly, but only at or about a certain time. The gist of the negligence was in starting the car while *plaintiff was in the act of alighting*. If plaintiff was in the act of alighting when the car started, and was injured thereby, without fault on her part, she was entitled to recover. We understand that defendant concedes this to be the rule. It might be extremely difficult for any one to know to a certainty, whether both feet were on the steps, or whether one was without support, in space, between the step and the pavement, or whether one was on the steps and the other on the pavement, upon an occasion like the one in question, where the car was started while the passenger was in the act of alighting.

The details which fix the exact moment or position of a person under such circumstances as existed in this case are usually arrived at by a process of reasoning rather than by memory; so that a person may easily be mistaken as to the exact position at a fixed time. No doubt in this case the starting of the car, the plaintiff standing with both feet upon the steps, and with one foot on the step of the car while the other was in space, and one foot upon the step while the other was upon the pavement, all occurred simultaneously, or so nearly simultaneously that the difference in time was imperceptible. As suggested above, the statement of one of these positions by the pleader was for the purpose of fixing the time at which the car was started. If the car was started at either one of the times, the negligence was the same, because all of the acts necessarily took place almost simultaneously while the plaintiff was in the act of alighting. The careless starting of the car while plaintiff was in the act of alighting was the negligence both alleged and proved. We are of the opinion that the finding of the jury that the plaintiff was standing with both feet on the steps of the car when it started did not negative the general verdict to the effect that the car was started while plaintiff was in the act of alighting from the car, and therefore

does not change the cause of action. There was no finding that the plaintiff was not in the act of alighting from the car when it was started. The most that can be claimed for the special findings is that they are susceptible of that construction.

"Where a special verdict is susceptible of two constructions, one of which will support the general verdict and the other will not, that construction will be given the special verdict which will support the general verdict." *McCorkle v. Mallory*, 30 Wash. 632, 71 Pac. 186.

We think the court did not err in refusing to render judgment for defendant notwithstanding the general verdict.

When the plaintiff B. M. Grant was a witness, it developed upon his direct examination that he was commonly called "doctor." He also testified that, when his wife was injured, the conductor of the car asked him his name and, in reply thereto the witness handed the conductor a small handbill containing his name, picture, location of his office, and an advertisement of his methods of treatment. On cross-examination counsel for defendant was permitted to ask the witness if he was a licensed practitioner, and if he had prescribed for his wife; and counsel for defendant was also permitted to introduce the handbill above mentioned in evidence, and question the witness concerning the same. We see no impropriety in this cross-examination. The jury was entitled to know who the witness was and the character of his business. Plaintiff contends that the object of the examination was to prejudice the witness before the jury; but we find nothing either in the examination or in the substance of the evidence in the record to justify a reversal upon this ground alone. There was certainly no abuse of discretion on the part of the trial court in respect to the cross-examination of this witness.

The judgment is therefore affirmed, without costs to either party.

HADLEY, C. J., CROW, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

[No. 6842. Decided September 6, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Amalgamated Republic Mines Company, Plaintiff*, v. SAM H. NICHOLS, *as Secretary of State, Respondent.*[1]

CORPORATIONS—FOREIGN—ARTICLES—PURPOSES—AUTHORITY TO DO BUSINESS. A foreign corporation, whose articles designate trust or agency powers, is not entitled to file its articles with the secretary of state unless it is incorporated in compliance with Laws of 1903, p. 367, regulating the incorporation of such trust companies in this state; since, Const. art. 12, § 7, and Bal. Code, § 4291, provide that foreign corporations shall not be permitted to do business in this state on more favorable conditions than are prescribed by law for similar domestic corporations; and the disavowal of the foreign corporation to do a trust or agency business cannot affect the matter, as there is no method of making the same a matter of record or giving notice thereof.

Application for a writ of mandamus, filed in the supreme court June 26, 1907, to compel the secretary of state to file the articles of a foreign corporation. Writ denied.

Belt & Powell, for relator.

The Attorney General and *A. J. Falknor, Assistant*, for respondent.

MOUNT, J.—Action in mandamus to compel the secretary of state to file in his office a certified copy of the articles of the Amalgamated Republic Mines Company, a corporation organized under the laws of the territory of Arizona. The secretary of state refused to file the articles because, among the many powers of the corporation as defined by its charter, were contained powers to deal in real estate, and do a brokerage agency and trust business. The corporation avers that the only business it desires or intends to transact in this state is to acquire mines and to establish and operate mills for the

[1]Reported in 91 Pac. 632.

treatment of ores. It disavows any intention of performing, or attempting to perform, any powers enumerated in its articles of incorporation which powers are prohibited by the laws of this state.

It is conceded that the relator has complied with all the provisions of the statute relating to the filing of articles of foreign corporations, and that it is entitled to have its articles filed here, unless the secretary of state may refuse to file the same because the articles enumerate the powers to do a real estate, brokerage, agency and trust business. If these were the sole powers of the corporation, it is clear that the writ would not issue, because foreign corporations organized after 1890 are prohibited from doing a real estate or brokerage business in this state, and this corporation, which was organized in Arizona on May 6th, 1907, is concededly not organized in pursuance of the provisions of the act of 1903, relating to trust companies. Laws 1903, page 367.

Bal. Code, § 4291 (P. C. § 7214), provides that any corporation, incorporated under the laws of the state for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have power to transact every kind of business in this state in the same manner and to the same extent as domestic corporations, by compliance with the conditions prescribed by succeeding sections,

"Provided, however, That this chapter shall not be so construed as to allow such foreign corporations to transact business within the state on more favorable conditions than are prescribed by law for a similar corporation organized under the laws of this state: . . . Provided, further, That no foreign corporation which is hereafter organized which has among its other powers the business of dealing in real estate, and buying and selling the same, and for the purpose of carrying on a real estate brokerage business, shall be permitted to transact such business of buying and selling and dealing in real estate, and carrying on a brokerage business therein, in this state; but this prohibition shall not extend to any

other business for the transaction of which such corporation may be organized."

The state constitution also provides, at § 7, of art. 12, that,

"No corporation outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law for similar corporations organized under the laws of this state."

In the case of *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462, where a domestic corporation sought to amend its articles so as to change its name from "Osborne, Tremper & Co., Inc.," to "Seattle Trust & Title Company," without complying with the act of March 17, 1903, relating to trust companies, we held that mandamus would not lie to compel the secretary of state to file the amended articles. And in *State ex rel. Gorman v. Nichols*, 40 Wash. 437, 82 Pac. 741, where it was sought to form a domestic corporation to do a trust or agency business, where the corporation was not formed in accordance with the act of 1903 relating to trust companies, we refused to compel the secretary of state to file the proposed articles. In this last-named case, some of the proposed powers of the corporation were powers for which the corporation might have been formed under the general incorporation laws, but most of the powers named were trust or agency powers. The formation of the corporation for those purposes was in violation of the trust company act, which provides that "hereafter no corporation shall be organized for the purpose of carrying on a trust company business in the state of Washington except under this act." Laws 1903, p. 367, § 1. In other words, we refused to permit a domestic corporation to be formed with trust powers among its other designated powers, where such corporation had not complied with the act relating to trust companies. It is clear, therefore, that if the relator were a domestic corporation, the writ would not issue to require the respondent to file the articles. It seems to follow, from this decision and from the provisions of the statute and the constitution to the effect

that foreign corporations shall not be allowed to transact business within the state on more favorable conditions than domestic corporations, that the writ ought not to issue in this case.

It is true the relator recites in the petition for the writ that it disavows any intention of doing any business prohibited by the laws of this state, but there is no provision of law by which such disavowal may become a public record so that persons dealing with the corporation might be informed of the powers of the corporation outside of the recorded articles. It is also true that the statute provides, at Bal. Code, § 4291 (P. C. § 7214), that no foreign corporation shall be permitted to transact a real estate or brokerage business and that "this provision shall not extend to any other business for the transaction of which such corporation may be organized." But this provision cannot be construed so as to permit foreign corporations to do business or to file articles of incorporation prohibited to domestic corporations. The mere filing of articles of incorporation may not be the transaction of business within the meaning of the constitution, but the filing of the articles apparently authorizes the corporation to do all the business named therein not expressly prohibited by law. A trust business is not denied to either foreign or domestic corporations. Either may do such business, but before doing so the corporation must be formed under the provisions of the trust act. Where the articles designate trust powers and the act relating to such powers is not complied with, the articles are misleading upon their face. Neither a foreign nor a domestic corporation can do business in this state without first filing its articles with the secretary of state. If a foreign corporation is permitted to file articles which a domestic corporation cannot, it would seem apparent that the former is shown a preference. For the purposes of business in this state, a foreign corporation is "organized" by the filing of a certified copy of its articles. To allow the relator to file its articles with trust powers would be, in effect, to permit its "organiza-

tion" in derogation of the act of 1903, and upon more favorable conditions than are allowed to domestic corporations. This would be opposed to the public policy of the state, as evidenced by the trust statute and the constitution cited, *supra*.

We are of the opinion, therefore, that when a domestic or a foreign corporation designates trust or agency powers in its articles of incorporation, it is required by the act relating to such powers to be incorporated in a particular way. The secretary of state ought not to be compelled to file articles which do not conform to the law in that respect.

The writ is denied.

HADLEY, C. J., FULLERTON, CROW, ROOT, RUDKIN, and DUNBAR, JJ., concur.

[No. 6654. Decided September 7, 1907.]

MARY AGNES McCLELLAN, *Appellant*, v. THOMAS G. W. O'CONNOR, *Respondent*.[1]

CANCELLATION OF INSTRUMENTS—FRAUD—EVIDENCE—SUFFICIENCY. A deed made by a mother to her son, who supported her, will not be set aside as procured by fraud and undue influence, at the suit of a daughter, where it appears that the mother and daughter were estranged, that the deed was made voluntarily seven years before the mother's death, while in complete possession of her faculties, and for the purpose of preventing the daughter from obtaining any share thereof.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered July 21, 1906, upon findings in favor of the defendant, dismissing an action for the cancellation of a deed, after a trial on the merits before the court without a jury. Affirmed.

Sol. Smith, for appellant.

Welsh & Welsh, for respondent.

[1]Reported in 91 Pac. 562.

Crow, J.—The plaintiff, Mary Agnes McClellan, brought this action against her brother, Thomas G. W. O'Connor, to cancel and set aside a deed executed by one Mary O'Connor, a widow, the mother of plaintiff and defendant, to recover the title to, and possession of, one-half of the realty thereby conveyed, and to also recover certain personal property. From a decree quieting the title of the defendant and refusing to cancel the deed, the plaintiff has appealed.

The evidence shows that on April 5, 1898, one William O'Connor, a single man, brother of appellant and respondent, died intestate; that certain land in Pacific county, of which he died seized, descended to his mother, Mary O'Connor; that on November 1, 1898, Mary O'Connor by quitclaim deed conveyed the land to the respondent, Thomas G. W. O'Connor; and that thereafter, on October 27, 1903, Mary O'Connor died intestate. On November 27th, 1905, more than seven years after the execution of the deed, and more than two years after the death of Mary O'Connor, the appellant, Mary Agnes McClellan, instituted this action, alleging that the respondent had procured the execution of the deed by fraud and misrepresentation; that Mary O'Connor, the grantor, was without business capacity; that she did not know what she was doing; that the deed was without consideration; that the land therein described still belonged to her estate; and that the appellant, as her heir at law, was entitled to a one-half interest therein. Appellant demanded that the deed be cancelled and set aside, and that she be awarded an undivided one-half interest in the land.

The trial court found that the deed was the valid and voluntary act of Mary O'Connor, that she was of sound mind, and that she intended to convey all of the realty to the respondent. Although many assignments of error have been presented and numerous points are discussed in the briefs, the one controlling question on this appeal is whether the findings are sustained by the evidence. Having carefully examined and weighed all of the evidence, we conclude that they

are supported by its clear preponderance. The appellant, by two marriages, both contracted against the opposition of her parents then living, had become estranged from them. She had been divorced from her first husband, and the evidence shows that her mother determined that neither she nor her second husband should receive any of the land, that Mary O'Connor voluntarily executed and delivered the deed to her son, the respondent, with whom she lived, and by whom her support was provided, and that she was at the time in complete possession of all her faculties, being of sound mind. There is an utter failure of competent evidence tending to show any fraud on the part of the respondent, or that he overreached his mother in any manner. No good purpose would be accomplished by discussing the evidence in detail. It is sufficient to state that it clearly sustains the findings made by the trial court, and the final decree entered.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, MOUNT, and DUNBAR, JJ., concur.

[No. 6673. Decided September 7, 1907.]

WITTLER-CORBIN MACHINERY COMPANY, *Appellant*, v. FELIX MARTIN *et al.*, *Respondents*.[1]

APPEAL—NOTICE—TIME FOR TAKING. The time for taking an appeal does not begin to run until the denial of a motion for a new trial, seasonably made.

SALES—CONDITIONAL SALES—DESCRIPTION. Under Laws 1903, p. 6, § 1, providing that a conditional sale shall be absolute as to purchasers, incumbrancers or subsequent creditors in good faith, unless within ten days a memorandum of such sale is filed in the county wherein the vendee resides, a description in a memorandum of sale of an engine contains a sufficient description to put purchasers on inquiry, although the location of the engine is wrongly stated and it could not be identified, when the index book required to be kept by the auditor showed the time of filing, name of vendor and vendee,

[1]Reported in 91 Pac. 629.

date of instrument, and amount of purchase price, and inquiry prosecuted would have disclosed that it was the only engine owned by the vendee in that county.

Same—Remedies of Seller—Bona Fide Purchasers—Burden of Proof—Memorandum of Sale—Evidence. In replevin by a vendor to recover an engine under the terms of a conditional sale, after the filing of a memorandum of the sale in the auditor's office, the burden of proof is upon the defendants to prove their allegations that they are *bona fide* purchasers without notice; and the memorandum of sale and proof of its filing is admissible in evidence to prove plaintiff's title.

Costs — Persons Entitled — Separate Defenses — Attorney's Fees. Defendants, separately appearing and pleading defenses based on different contracts, are each entitled, upon a dismissal, to tax the statutory attorney's fee as costs.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered September 13, 1905, dismissing an action of replevin, upon granting a motion for a nonsuit at the end of plaintiff's case. Reversed.

Rose & Craven, for appellant.

Hardin & Hurlbut, for respondents.

Crow, J.—On December 23, 1903, the plaintiff, Wittler-Corbin Machinery Company, a corporation of Seattle, Washington, made to one Earl B. Nims a conditional sale of one 30-horse power, stationary, side-crank, slide-valve engine, manufactured by L. L. Graves, of Streetor, Illinois. A written memorandum of the sale stating its terms and conditions, signed by the vendor and vendee, was, on December 31, 1903, filed in the office of the auditor of Whatcom county, the same being the county in which the vendee resided. This contract stipulated, that the purchase money should be paid by Nims in installments; that the engine should be located and remain at Lynden, Whatcom county, Washington, where Nims intended to install a shingle mill; that it should not be removed without the consent of the vendor; that time was of the essence of the contract; and that title should remain in the vendor until all payments were made.

The engine was described as follows: "1 30-horse power stationary, side-crank slide-valve engine, complete with all fittings, including governor and throttle, band wheels, lubricator, oil cups, and all steam connections." It was delivered to Nims on board cars at Getchell, Snohomish county, and shipped to Bellingham, Whatcom county. Nims, on its receipt in January, 1904, installed it in a small mill near Bellingham, instead of Lynden as agreed. It does not appear that he ever owned or installed any mill at Lynden. Default was made by him in payments of purchase money, and the plaintiff finding the engine in the possession of the defendants, Felix Martin and Home Security Savings Bank, a corporation, demanded its return, and commenced this action to recover its possession.

The defendants, the Home Security Savings Bank and Felix Martin, answered separately, the former pleading a mortgage executed by Nims, and the latter claiming title by purchase from Nims subject to the mortgage. The defendants each alleged that they had acquired their interests in good faith, without any notice, actual or constructive, of the plaintiff's title. In reply the plaintiff denied these allegations, and affirmatively pleaded the conditional sale, the filing of the contract with the county auditor, and constructive notice to the defendants.

On trial before a jury, the plaintiff offered the memorandum of conditional sale in evidence, with proof of its filing. To this offer the defendants objected, insisting that the description was indefinite and defective; that the location of the property was not correctly stated, and that the memorandum was insufficient to give constructive notice. The trial court reserved its ruling until the plaintiff, by the testimony of its salesman, had shown that the conditional sale was actually made to Nims; that the engine was then in Snohomish county; that Nims was to establish it in a small mill near Lynden; that the plaintiff afterwards found it in defendants' possession near Bellingham, and that it demanded possession, which was

refused. Thereupon the trial judge declined to admit in evidence the memorandum of sale or the proof of its filing. No further evidence being offered, a nonsuit was granted upon motion of the defendants, and a judgment of dismissal was entered. The plaintiff has appealed.

The respondents, claiming that oral notice of appeal was given at the time of the granting of the nonsuit, have moved to dismiss the appeal for the reason that the appeal bond was not filed in time. The nonsuit was granted and judgment entered on September 13, 1905. We cannot ascertain from the record that any oral notice of appeal was then given. On September 14, 1905, within the statutory time, the appellant filed a motion for a new trial, which was not denied until July 16, 1906. The appellant served and filed written notice of appeal, and also filed its appeal bond on October 6, 1906. The seasonable filing and service of a motion for new trial suspends judgment to such an extent that it is not final, until the motion is denied. *State ex rel. Payson v. Chapman*, 35 Wash. 64, 76 Pac. 525; *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535, 77 Pac. 839. The time for appeal did not commence to run until the denial of the motion on July 16, 1906. The appeal was thereafter properly perfected within statutory time. The motion to dismiss is denied.

The appellant contends that the trial court erred in refusing to admit in evidence the memorandum of conditional sale with proof of its filing with the county auditor. Prior to the enactment of chapter 106, Session Laws 1893, p. 253, conditional sales of personal property retaining title in the vendor were valid in this state, not only between the vendor and vendee, but also as against subsequent *bona fide* purchasers, incumbrancers, or creditors. *De Saint Germain v. Wind*, 3 Wash. Ter. 189, 13 Pac. 753; *Dodd & Co. v. Bowles*, 3 Wash. Ter. 383, 19 Pac. 156; *Quinn v. Parke & Lacy Machinery Co.*, 5 Wash. 276, 31 Pac. 866. To obviate the hardship of this rule, the legislature passed the act of 1893, *supra*, which was afterwards amended by chapter 6 of the Session Laws

of 1903, page 6. Section 1 of the last-mentioned act provides:

"That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, encumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides."

This statute did not invalidate conditional sales as between the original vendor and vendee, or as to third parties not *bona fide* purchasers or encumbrancers, where no memorandum was filed with the auditor, or where the description in any memorandum duly filed was indefinite. This being true, the written agreement was competent evidence as tending to sustain the appellant's allegation of title in itself.

The respondents contend, that the description of the engine contained in the memorandum was insufficient to give constructive notice of appellant's title; that it described the engine as being located at Lynden; that it never was located or kept there; that the respondents first saw it in Nims' possession and apparent ownership near Bellingham; that the description in the written memorandum would apply to any one of numerous engines located in Whatcom county; that the appellant had failed to mention the name of the manufacturer stamped on the engine; and that the description was so imperfect as to make the memorandum void for the purpose of giving constructive notice to respondents, who claim to be subsequent holders as *bona fide* purchaser and mortgagee.

We are unable to agree with this contention. The property when sold was in Snohomish county, and was to be thereafter delivered to Nims, who was to locate it at Lynden in Whatcom county. This he never did. Assume, however, that he had done so and that thereafter, without the knowledge or consent

of the appellant, he had removed it to Bellingham where the respondents first saw it, appellant would not have lost its title by reason of such removal. Yet, if the respondents had thereafter dealt with Nims, they would have been in no better position as to constructive notice than they now are. The 1903 statute, without referring to the location of the property, provides that the memorandum shall be filed in the office of the auditor of the county where the vendee resides, and § 2 provides that the county auditor "shall enter in a suitable book to be provided by him at the expense of his county, with an alphabetical index thereto, and exclusively for that purpose, ruled into separate columns with appropriate heads, 'The time of filing,' 'Name of vendor,' 'Name of vendee,' 'Date of instrument,' 'Amount of purchase price,' and 'Date of release.'" This contemplates that any person desiring to purchase personal property from one in possession thereof may, for protection, examine this book and index. Had the respondents done this, they would have learned of the memorandum of conditional sale, indexed in the names of appellant as vendor and Nims as vendee. It affirmatively stated that the vendor was a Seattle corporation, and that the vendee was a resident of Whatcom county. Respondents as intending purchasers could have applied to either for information. By doing so they would have ascertained that Nims had no mill other than the one located near Bellingham, and that the engine they were about to purchase was the identical engine mentioned in the memorandum of conditional sale. By prosecuting inquiries suggested by the memorandum on file, they would have obtained all information necessary for their protection. The description should not be held insufficient as a matter of law. In *Willey v. Snyder*, 34 Mich. *60, Mr. Chief Justice Cooley, in commenting upon the sufficiency of descriptions in chattel mortgages, said:

"But if a stranger is to be sent out to select property mortgaged, with no other means of identification than such as are afforded by the written description, and without being at lib-

erty to supplement that information by such as can be gained in the mortgagor's neighborhood by inquiry of those who know what property the mortgagor was possessed of which would answer the description in the instrument when it was given, and by possessing himself of such other circumstances as persons usually avail themselves of in applying written descriptions to the things intended, it is much to be feared that the stranger would be so often at fault that chattel mortgages, if their validity depended upon his success in identifying the property, would seldom be of much value as securities. Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect; the parties and their privies. A subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the facts, so far as may be needful to his protection, and he purchases in view of that knowledge."

Had respondents examined the index and files of the auditor's office, they would have learned of the conditional sale of an engine to Nims by appellant. As Nims resided in Whatcom county, this fact would have been sufficient to place a cautious business man on inquiry for the purpose of ascertaining *what* engine had been so sold. The evidence, however, fails to show that respondents either examined the records or made any investigation. As against Nims and all third parties not *bona fide* purchasers or incumbrancers, appellant was the owner, and respondents can only secure their alleged rights by showing that they were obtained from Nims in good faith. They severally alleged themselves to have been innocent holders, one as purchaser and the other as incumbrancer, without notice of appellant's title. These allegations being denied, the burden of proof to sustain them rested on respondents. No such proof was offered or made. A party seeking to avail himself of rights as an innocent purchaser must affirmatively plead and prove such rights. 2 Abbott, Trial Brief, p. 1634, § 43; *Diemer v. Guernsey*, 112 Iowa 393, 83 N. W. 1047; *Wilhoit v. Lyons*, 98 Cal. 409, 33 Pac. 325.

Under statutes of other states providing for the filing or recording of written memoranda of conditional sales, this rule has, in well-considered cases, been especially applied to defendants in replevin actions who claimed to have purchased in good faith from vendees in possession of personalty under such conditional sale contracts. *Crumrine v. Reynolds*, 13 Wyo. 111, 78 Pac. 402; *Singer Mfg. Co. v. Nash*, 70 Vt. 434, 41 Atl. 429. The honorable trial court erred in refusing to admit in evidence the memorandum of conditional sale, with proof of its filing with the county auditor.

The respondents appeared by the same attorney, but answered separately. In their separate cost bills they each taxed a statutory attorney fee. The appellant moved the court to retax costs by allowing them but one fee. This motion being overruled, it assigns error, contending that respondents were entitled to one fee only. Assuming the respondents to be entitled to costs, this contention cannot be sustained. One respondent answered claiming title by purchase, while the other pleaded a mortgage. These defenses were based on different contracts, and were properly presented by separate answers. The fact that both respondents were represented by the same attorney is immaterial. *Koyukuk Mining Co. v. Van De Vanter*, 30 Wash. 385, 70 Pac. 966.

For error in refusing to admit the written memorandum in evidence with proof of its filing, the judgment is reversed, and the cause remanded for a new trial.

Hadley, C. J., Rudkin, Fullerton, Mount, and Dunbar, JJ., concur.

[No. 6629. Decided September 7, 1907.]

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Appellant*, v. HUBBARD F. ALEXANDER *et al.*, *Respondents*.[1]

EMINENT DOMAIN—DAMAGES—REMOTENESS—INJURY TO LAND NOT TAKEN. In proceedings to condemn land for a railroad right of way, to be used as an approach to a stationary bridge, authorized by the Federal government over a stream navigable for small craft, it is error to permit the defendants to show damages that would accrue to their remaining lands in case the river is improved and the government requires the substitution of a drawbridge obstructing the shore of such remaining lands, where such prospect is very remote and condemnation is not sought of defendant's shore rights, damages to which can be recovered in another action.

SAME—DAMAGES—EVIDENCE—VALUE OF PROPERTY. On the question of the value of land condemned, it is inadmissible to show what price similar land near by is held at by another owner.

DEPOSITIONS—EXAMINATION OF WITNESS—EXCEPTIONS. Upon taking a deposition before a trial judge, where objections are ruled on at the time and exceptions taken, the exceptions need not be renewed at the trial.

EMINENT DOMAIN—DAMAGES—EVIDENCE—VALUES OF PROPERTY—EXPERTS. A witness not acquainted with values in a certain city, who examines a few manufacturing sites with a view of purchasing or locating in such city, is not qualified as an expert in real estate values in such city.

SAME—VALUE OF PROPERTY—OFFERS. On the question of the value of land condemned, it is error to permit the defendant, on examination in chief, to introduce evidence of offers that had been made for the land.

SAME—VALUE OF PROPERTY—ORDER OF PROOF—REBUTTAL. Upon an issue as to damages to a tract of land, cut in two by condemnation for a railroad right of way, where the evidence on the part of the defendant shows that the value of the tract for a manufacturing plant is thereby destroyed, it is error to exclude expert evidence in rebuttal to the effect that such a manufacturing plant as referred to by the defendants could be built and successfully operated on the two tracts, that question not having been raised in plaintiff's case in chief.

[1]Reported in 91 Pac. 626.

TRIAL—INSTRUCTIONS. The unnecessary repetition of instructions might be ground for reversal.

EMINENT DOMAIN—DAMAGES—REMOTENESS—VALUE OF PROPERTY—EVIDENCE—SPECULATIVE USES. In estimating the value of land taken in condemnation proceedings, reference may be had to the uses to which the land is suitable, or may reasonably be expected to be put in the immediate future; but the fact that a river of small depth may be made navigable by the government for large vessels, and the land thereby become a shipping point, is too remote and speculative to be considered in fixing the value of the land, when no dredging plan is shown to any point within two miles of the property.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered December 1, 1906, upon the verdict of a jury awarding damages for the value of land condemned for a railroad right of way. Reversed.

H. S. Griggs (*H. H. Field* and *William P. Reynolds*, of counsel), for appellant.

Hudson & Holt and *J. M. Ashton*, for respondents.

CROW, J.—Action by the plaintiff, Chicago, Milwaukee & St. Paul Railway Company, against Hubbard F. Alexander and others, to condemn land near the city of Tacoma for a right of way. After an order had been entered adjudging the proposed use to be public, a jury was impaneled, and awarded the defendants $55,205, for the value of the land taken and damage to the land not taken. From a judgment assessing damages in this amount, the plaintiff has appealed.

Respondents' land, with a frontage of four hundred and fifty-five feet on the east bank of the Puyallup river, consists of a little less than nine acres. Its north line abuts on the interurban electric railway track, which crosses the Puyallup river near respondents' northwest corner. The appellant is condemning a right of way for its tide water line, which crosses the nine-acre tract from southeast to northwest, dividing it into two parts, but does not cross the river. It is also condemning a right of way over the south side of respondents'

land for its city line, which crosses the river from east to west. Appellant filed and served on respondents profiles of its proposed stationary bridge across the Puyallup river, together with a certificate of its approval by the proper United States authorities. This bridge will not touch respondents' land or water front. The appellant is appropriating 2.35 acres, leaving 3.25 acres fronting the Puyallup river, and 3.21 acres separated from the river by appellant's tide water line. Respondents' land is located a considerable distance inland from Puget Sound. Appellant's city line of railway will be constructed on an embankment from twenty-five to twenty-seven feet in height, and its tide water line on an embankment about five feet in height above the surface of respondents' land. The appellant, by stipulation on file, has agreed to construct and forever maintain a suitable crossing between respondents' two remaining tracts over appellant's tide water line wherever respondents desire, and also such culverts and drains as may be necessary to afford the land as good drainage as it has by nature.

The respondents introduced one Nicholson, a civil engineer, who, over appellant's objections, was permitted to testify that, if the Puyallup river should hereafter be made navigable for large vessels, and the United States government should rquire appellant to construct a drawbridge across the river on its city line, such drawbridge, when opened for the passage of vessels, would obstruct respondents' water front to the extent of about seventy-six feet. The purpose of this evidence was to show that such obstruction would interfere with steamships and other vessels that might come from Puget Sound and stop at respondents' water front. At present the river has but little depth. It is not shown that any vessels larger than steam tugs have ever passed the interurban bridge. The possibility of the river being dredged to respondents' land by the United States government is very remote. There is no certainty that the government will ever require a drawbridge near respondents' land. If it should do so, respondents can,

in another action, then recover such damages as they may sustain by reason thereof. The appellant is not seeking to condemn or interfere with any of respondents' shore rights. The United States government has authorized a stationary bridge which does not touch their land. No other bridge may ever be required. This evidence was calculated to mislead the jury into awarding damages which the respondents were not entitled to recover, and its admission was therefore erroneous.

One Baker, who owns three or four acres of similar land, near that of respondents, was, over appellant's objection, permitted to testify that he held the same at $15,000 per acre. This evidence, admitted on direct examination, was improper and constituted error, not being a correct test of value. An owner might not be willing to sell at any price, and might therefore place an excessive value on his own property. The issue before the jury was the fair market value of the land taken, and not what some owner might arbitrarily ask for similar land held by him.

The respondents introduced the deposition of one Stokes, a resident of Portland, Oregon, and manager of a large sawmill and manufacturing plant at Bucoda, Washington. This witness was not shown to be an expert on values, nor was he familiar by acquaintance and experience with lands in or near the city of Tacoma. He testified that, on a trip to Tacoma, he looked for a site for a large lumber mill and manufacturing plant where he could be near tide water with the advantages of navigation; that he investigated the respondents' nine-acre tract; that he priced some land on the Sound, near Old Town in Tacoma, several miles distant; that he regarded respondents' land as especially valuable for a large mill if the entire nine acres could be used in one tract without any railroad crossing it; that he examined the land after this condemnation proceeding had been commenced, when it was known that it would be divided into two tracts by appellant's tide water line; and the respondent Alexander wanted to know if

he could use the tract as it would be thus divided. He was about to state a conditional offer he then made to Alexander, when appellant objected, but its objection being overruled, the witness stated his offer, which he had made on condition that the land contained something over eight acres and would not be divided by any line of railroad. Afterwards the appellant interposed a motion to strike this answer. Sustaining this motion, the trial judge, in part, said:

"If a man is offered a certain price in good faith by a man who is liable to carry the offer out, that would be the best criterion of the value of property, . . . The supreme court of the United States, however, reasons that offers are not evidence of what property will bring, and it seems, in *Parks v. City of Seattle*, that our own supreme court has plainly affirmed that doctrine, although in that case the offer sought to be proven was proffered from the mouth of the plaintiff to whom the offer was made, and the man making the offer was not on the witness stand and subject to cross-examination. Yet I think they have very definitely settled the doctrine that that class of testimony is not competent to fix values. I think that the fact might be brought out in another way, and in a way which would avoid the error or the danger that the supreme court of the United States and the supreme court of this state seem to feel has followed that class of testimony. . . . I think that this testimony, or rather, this offer, as proven by this witness, is hypothetical and based on a condition which could not exist, and for that reason, and for the further reason that class of testimony is not a proper way to prove values, this question and this answer may be stricken. I think, however, that you may ask this witness how much that property is worth, and he may answer what he considers it worth, and I think he might furthermore be permitted to back up his opinion by saying that he would give that for the property. . . But if this witness is willing to come on the stand and give it as his opinion that the property was worth just what he offered for it, I think that is proper testimony; he can testify what it is worth. . . . and I think he would be permitted to go further and say he is ready to take it at that price. . . . The question is, what is the value, and if he can testify that the value of the property is just what he offered, I think that would be competent."

After further questions and objections, the witness testified, in substance, that the land as an entire tract was worth $87,300, what he had offered for it, but that, divided by appellant's proposed tide water line of road, it would be of but little value for a manufacturing plant. Counsel for respondents asked the witness whether he stood ready to pay for the land the value he had referred to, viz., $87,300, assuming the acreage was about what he understood it to be, and over appellant's objection he was permitted to answer in the affirmative. This statement shows, (1) that, in effect, the witness was permitted to state the conditional offer made by him; (2) that the evidence finally given was the direct result of a voluntary suggestion, made by the court in the presence of the witness, that he could base his estimate of value upon what he had offered for the land. The offer made by the witness was thus placed before the jury.

The respondents contend, (1) that no proper exceptions were taken to this evidence; that appellant's only exceptions were in the deposition, and not renewed in court; (2) that the witness only testified as an expert to his valuation of the land; and (3) that while an offer for the land may be shown by evidence of the owner to whom it was made, it may be shown by the person making it, he being subject to cross-examination. The deposition had been taken before the trial judge, who ruled on the objections when made and allowed exceptions. It was not necessary to renew these exceptions at the trial, as it would have been had the deposition been taken before a notary public, or other officer than the judge himself. The witness was not shown to be qualified as an expert on land values in or near Tacoma; hence the substance of his evidence was merely a statement of the offer made by him. Neither the party who makes an offer for land nor the party to whom it is made should, for the purpose of showing value, be permitted to testify to the same upon his examination in chief in an action of this character. In *Hine v. Manhattan R. Co.*, 132 N. Y. 477,

480, 30 N. E. 985, 15 L. R. A. 591, Mr. Justice Parker, quoting from *Keller v. Paine*, 34 Hun. 167, said:

"But we pass to the objection that in such a case as we have under consideration, offers may not be proven even by the party making them. The General Term of the fourth department, had the question before it in *Keller v. Paine* (34 Hun. 167-177). And in discussing the question the court said: 'It has been intimated in some cases that offers are some evidence of value. But it is a class of evidence which it is much safer to reject than to receive. Its value depends upon too many circumstances. If evidence of offers is to be received it will be important to know whether the offer was made in good faith, by a man of good judgment, acquainted with the value of the article and of sufficient ability to pay; also whether the offer was cash, for credit, in exchange, and whether made with reference to the market value of the article, or to supply a particular need or to gratify a fancy. Private offers can be multiplied to any extent for the purpose of a cause, and the bad faith in which they were made would be difficult to prove.' The reasons thus assigned in support of the decision made we finally approve."

See, also, *Parke v. Seattle*, 8 Wash. 78, 35 Pac. 594; *Saint Joseph etc. R. Co. v. Orr*, 8 Kan. 419; *Sharp v. United States*, 191 U. S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211.

The appellant on rebuttal introduced one Hobart, a competent expert in designing and laying out sawmills and manufacturing plants, and offered to show by his testimony that he had designed a lumber mill and manufacturing plant which could be constructed and profitably operated on the two tracts of land left to respondents, and produce from seventy-five to ninety thousand feet of lumber a day in ten-hour shifts. Upon respondents' objection, this evidence was erroneously excluded as not proper rebuttal. The appellant in its principal case had not offered any evidence as to the available character of the land for sawmill and manufacturing purposes, although some incidental remarks on that question were made by its witnesses, principally in response to the cross-examination conducted by respondents' counsel. The appellant had not been

advised by any pleading or statement that the respondents would claim the entire tract was particularly valuable for a large sawmill and manufacturing plant, or that, after being divided by appellant's right of way, it would be of little or no value for any such purpose. After respondents had introduced such evidence to show value of the land taken and damage to the land not taken, the appellant should have been permitted to introduce in rebuttal the evidence offered.

Appellant contends that the trial court erred in unnecessary repetitions of its instructions, especially of those favorable to respondents. It contends that such action had a tendency to place undue and particular stress upon such instructions, was prejudicial to appellant, and constituted reversible error. The instructions were frequently and unnecessarily repeated. In view of the new trial to be granted herein, we will state that such a course should be avoided by trial judges. In *Meachem v. Hahn & Co.*, 46 Ill. App. 144, 149, the court, commenting on repeated instructions, well said:

"Counsel may select the strong and salient points appearing, and seek in the argument to direct the thought of the jury to them as being the important and controlling features of the case, but the instructions of the court should not be made the medium for conveying such views to the jury."

Although a judgment might not in every instance be reversed for such unnecessary repetitions, it might in furtherance of justice sometimes become necessary to grant a reversal. 1 Blashfield, Instructions to Juries, §108; 2 Current Law, 470.

Much evidence was admitted to show that the entire and undivided tract was especially valuable for an extensive manufacturing plant by reason of its location on the Puyallup river, which, if dredged, deepened and improved by the United States government, would become navigable for large ocean steamers, and that such vessels could then be taken to the respondents' water front for loading and unloading. Experts on land values took these possibilities into consideration when testifying to the market value of the land taken, and when

estimating damage to the land not taken. In arriving at the value of land taken for a public use, its market value may be shown, not merely for the use to which it may in fact be applied, but also with reference to the most available and valuable use to which it may be adapted. The supreme court of the United States, in *Boom Company v. Patterson*, 98 U. S. 403, 408, 25 L. Ed. 206, said:

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

The words "immediate future," advisedly used, contemplate that the especial use must be valuable, practical, and available within a reasonable time. The Puyallup river is not at present navigable except for rafts, sawlogs, and possibly small tugboats. Steamers cannot reach respondents' property unless the river is dredged between it and Puget Sound. It is not shown that any dredging plan, to any point within two miles of respondents' land, has ever been contemplated or considered. Such an improvement may not be made for many years, or perhaps never, so as to reach respondents' land. Any valuable use of the land, therefore, based upon such navigation, is remote, uncertain, speculative, and an unreasonable circumstance to be considered either in fixing value of the land taken, or damage to the land not taken. The purpose of assessing damages in an action of this character is to award an owner fair, complete, and adequate compensation for land taken, based upon its actual market value, together with further and ample compensation for damages to land in the same tract, not taken. The condemning corporation should not be permitted to appropriate the land for any less sum. On the

other hand, it is not intended that owners of property may recover excessive damages based upon fictitious, visionary, or remote contingencies which may or may not at some indefinite time in the future, increase the value of the land. If the Puyallup river was navigable for large vessels at this time, or if it was reasonably certain that it would become so in the immediate future, the anticipated conditions above mentioned and valuations based thereon might become competent for consideration by the jury; but at present such conditions and circumstances, as a basis for valuation, are too remote, speculative, and improbable to warrant evidence of the character above mentioned. *Munkwitz v. Chicago etc. R. Co.*, 64 Wis. 403, 25 N. W. 438.

The respondents contend that the appellant has not interposed proper exceptions to this evidence. Without passing upon the sufficiency of the exceptions taken, we make the above suggestions in view of the fact that a new trial will be necessary in this cause.

The judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., MOUNT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

[No. 6732. Decided September 7, 1907.]

EDGAR GAGE, *a Minor, by J. I. Seward, His Guardian Ad Litem, Appellant,* v. SPRINGSTON LUMBER COMPANY, *Respondent.*[1]

TRIAL—INSTRUCTIONS. Where the questions of negligence and contributory negligence are for the jury, each side is entitled to have the same submitted on proper instructions.

SAME. Although instructions as a whole may be correct, the case should be reversed if some parts are confusing and misleading, to the possible prejudice of the appellant.

MASTER AND SERVANT — ACTIONS — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE. In an action for personal injuries, it is error to instruct that the plaintiff cannot recover if his own negligence contributed approximately to the injury, the rule being that there must be want of ordinary care on the part of the plaintiff.

SAME—YOUTHFUL EMPLOYEE—DEGREE OF CARE. In an action for personal injuries sustained by a youthful employee, it is error to instruct that the plaintiff cannot recover if he received the injury in consequence of failing to observe reasonable instructions given to him, where no explanation is given as to what were reasonable instructions considering his youth and inexperience, except that the standard for his care was fixed in another instruction as such reasonable care as would be exercised by an ordinarily prudent person; since he was entitled to a more specific statement of the duties of an employer of children.

SAME—ASSUMED RISKS—YOUTHFUL EMPLOYEE. In an action for injuries sustained by a youthful employee, it is error to give an instruction as to assumed risks which would be applicable to an adult employee, without making any reference to plaintiff's youth.

SAME—CONTRIBUTORY NEGLIGENCE. In an action for personal injuries it is error to instruct, on the subject of contributory negligence, that the plaintiff cannot recover if he did "anything" that "in any way" contributed to the injury.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 7, 1906, upon the verdict of a jury rendered in favor of the defendant, after a

[1]Reported in 91 Pac. 558.

trial on the merits, dismissing an action for personal injuries sustained by a minor employee in operating a cut-off saw. Reversed.

Thos. H. Wilson, John C. Kleber, and *Robertson & Rosenhaupt*, for appellant.

Danson & Williams and *Peacock & Ludden*, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries. The defendant operated a sawmill at Springston, Idaho, and the plaintiff was, at the time of the accident, in the defendant's employ. The plaintiff was then a boy, fifteen years of age. He was, when injured, operating a drag or cut-off saw for cutting slabs into shorter lengths. As the slabs were cut from the logs by the main saw of the mill, they were carried by means of live rolls to a position in front of the cut-off saw. This saw was suspended in a swinging frame and operated by means of an overhead shaft with accompanying pulleys and belt. When the slab was in proper position, the operator of the saw pulled the saw frame toward him by a handle attached for that purpose. This dragged the saw toward the operator and, by its circular motion, it cut its way through the slab, the course described by the saw being that of the arc of a circle. As the saw emerged from the slab, its moving teeth came above the table on which the slab rested and revolved in front of the operator. While the plaintiff was thus operating the saw, it was drawn forward so as to strike his right arm, entirely severing a portion of the arm from his body.

The complaint charged negligence on the part of defendant in a number of particulars relating to the construction and method of operating the saw, and also charged that defendant neglected to instruct the plaintiff as to the dangers and hazards of said place, and the defects in the saw and appliances. It was also alleged that these were not obvious to the mind of the plaintiff, and that he neither knew nor appreciated the

dangers. The defendant denied that it was negligent, and averred that the plaintiff's injuries were due to his own contributory negligence, and also that with knowledge of the danger he voluntarily assumed the risk thereof. The cause was tried before a jury, and a verdict was returned for the defendant. Plaintiff's motion for new trial was overruled, and judgment was entered dismissing the action. The plaintiff has appealed from the judgment.

The errors assigned all relate to instructions which were given to the jury, and to the refusal to give others requested by appellant. The respondent argues that, even if errors were committed in giving the instructions, they became harmless in view of the verdict, for the reason that it was entitled to have the jury instructed to return a verdict in its favor. We do not think the evidence warranted such an instruction in respondent's favor. Under the testimony, all questions of negligence or contributory negligence were for the jury, and each party was entitled to have those questions submitted to the jury by correct instructions, fully and clearly defining the law applicable to the facts as claimed by him. Somewhat extensive instructions were given, and to set forth all the criticized instructions *in haec verba*, with a discussion thereof, would require more space than the importance of the subject warrants. The respondent urges that, when the instructions are read as a whole, the objections to segregated parts thereof are overcome. In some respects such would doubtless be true in some cases; but under the particular facts of this case, we think that, even when the instructions are all considered as a whole, there are some parts that may have been confusing and misleading to the jury to the possible prejudice of appellant.

Without undertaking to take up in detail all the subjects assigned as error, we will refer to certain ones only. The following instruction was given:

"Or, if you should find that both the plaintiff and defendant were negligent, and the plaintiff's negligence contributed

proximately to the happening of the injury, then the plaintiff cannot recover, and your verdict must be for the defendant."

It will be seen that no reference is made in this instruction to the standard of reasonable and ordinary care, as being all that was required of appellant. The instruction might easily have been understood by the jury to mean that, without regard to any question of care, if appellant's conduct in any way contributed to the injury, it became negligence and precluded his recovery. The rule is, however, that, to constitute contributory negligence, there must be want of ordinary care, having in view all the circumstances of the case, and such lack of ordinary care must contribute to the injury as an efficient cause thereof. 7 Am. & Eng. Ency. Law (2d ed.), 375, 380. A part of the text upon the last-cited page, supported in the foot note by the citation of many authorities, is as follows:

"Nor will the fact that the person injured proximately contributed to his own injury by his conduct constitute contributory negligence, if he was not guilty of a want of ordinary care."

The following appears in the instructions:

"But if the defendant should give the plaintiff reasonable instructions as to the use of tools and machines, and the plaintiff should not observe such instructions, and should receive an injury in consequence, the defendant would not be liable therefor and the plaintiff could not recover."

The above fails to call the attention of the jury to the fact that, in determining what were reasonable instructions to appellant, they should take into consideration all the circumstances, particularly the boyhood of appellant and the extent and character of his experience; that to make such instructions reasonable, they must have been such as would have been understood by an ordinary boy of appellant's age and experience, leading such a one to appreciate the dangers of the situation. It is true, in another instruction reference is made to the age, experience, and capacity of appellant, and that re-

spondent should have taken these into consideration when instructing appellant; but no standard is specified for such instructions except that that degree of care should be exercised which an ordinarily prudent person would exercise under like circumstances. We think, in view of the boyhood of appellant and of his necessarily limited experience at the age of fifteen years, that he was entitled to more specific statement of the duties resting upon the employer of children than the mere general statement applicable to the ordinary cases of adult persons.

"Complaint is further made of a series of instructions, all to the effect that the conduct of the deceased, who was a girl of 13, was to be measured by what 'an ordinarily cautious, careful, and prudent person would have done under the same circumstances.' It is said that herein no allowance is made for the fact that the deceased was a minor child, and that the jury might well have been misled into believing that the care, caution, and prudence required of her were the care, caution, and prudence which the ordinary adult person would have exercised under the same circumstances. Of course, as was said in *Studer v. Southern Pacific Co.*, 21 Cal. 400, 53 Pac. 942, 66 Am. St. 39: 'The same act which would be negligence in an adult may not be such if done by a child, but a child is required to exercise the same degree of care that would be expected from children of his age, or which children of his age ordinarily exercise. . . . Children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have. The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid dangers as may fairly and reasonably be expected from persons of their age and capacity.' In this regard, also, to avoid the possibility of misunderstandings, the instructions could profitably be made more explicit." *Quill v. Southern Pacific Co.*, 140 Cal. 268, 73 Pac. 991.

With respect to the difference between the general rules applicable in cases of adults and children, see, also, *Kirby v. Wheeler-Osgood Co.*, 42 Wash. 610, 85 Pac. 62.

The following instruction was given:

"It is also the law that the plaintiff assumes all known dangers in and about his duties, and if there were defects or dangers in and about the machinery, plaintiff was working at, and the plaintiff knew, or in the exercise of ordinary care should have known of such defects and dangers, then he assumes all risk of danger from such defects, and if he is injured thereby the defendant would not be liable and the plaintiff cannot recover; and where the defects, if any, are known and apparent, the plaintiff assumes all danger therefrom, whether he has been instructed as to such defects or not."

In the above instruction no reference is made to the boyhood of appellant, or to the rule as to ordinary care in such a case. The jury were left to infer that the same test for determining ordinary care applies in the case of instructing the child as in that of an adult. In this respect the instruction was defective.

"In such cases, while a minor employee is held to have assumed the risks of the employment, yet it is only such risks as one of his age, discretion, and experience can be said to have comprehended that he will be charged with having assumed. And he may recover for injuries resulting from dangers that, by reason of youth, immaturity, and inexperience, he was unable to fully apprehend, and the perils of which had not been explained to him." 7 Am. & Eng. Ency. Law (2d ed.), pp. 407, 408.

The following instruction was given:

"If the plaintiff himself did any act which contributed proximately to his injury, then he can not recover, and the defendant would not be liable, even if the defendant was negligent in any one or more of the respects alleged in the complaint, and of which caused the injury. In other words, where the plaintiff himself did anything which contributed in any way to the injury as I have heretofore stated, then he cannot recover even if the defendant was negligent."

The above instruction squarely stated to the jury that, if the appellant did "anything" which "in any way" contributed to his injury, he could not recover, and that, too, without re-

gard to how much or what degree of care he may have exercised under all the circumstances. The instruction was erroneous within the decision in *Atherton v. Tacoma R. & Power Co.*, 30 Wash 395, 71 Pac. 39, and cases there cited. The rule as stated in the instruction requires that appellant, in order to entitle him to recover, should have been absolutely free from any negligence whatever. By the opinion cited, and other decisions of this court there mentioned, it is established in this state that all that the law requires in such cases is the exercise of ordinary care under the circumstances surrounding one, and that he may exercise such care although he may be slightly negligent in the broadest sense of the term.

Other assignments are made, relating to the instructions given and requests refused; but we believe further discussion is not necessary, in view of what has been hereinbefore said.

The judgment is therefore reversed, and the cause remanded with instructions to grant a new trial.

CROW, MOUNT, and DUNBAR, JJ., concur.

FULLERTON, J.—I think the last instruction quoted erroneous, and for that reason concur in the result.

RUDKIN, J., concurs with FULLERTON, J.

[No. 6761. Decided September 7, 1907.]

JAMES D. COX, *a Minor, by His Guardian Ad Litem, Kate Alden, Respondent*, v. CAPITOL BOX COMPANY, *Appellant.*[1]

MASTER AND SERVANT—INJURY TO SERVANT—YOUTHFUL EMPLOYEES—FAILURE TO INSTRUCT—CONTRIBUTORY NEGLIGENCE—ASSUMED RISKS—EVIDENCE—QUESTION FOR JURY. In an action by an employee, a boy eighteen years of age, who was injured while working with an inexperienced assistant sixteen years of age, in operating, for the first time, a ripsaw in a box factory, the questions of plaintiff's contributory negligence, and whether he assumed the risks, and of defendant's negligence in placing an incompetent co-employee at work with plaintiff, and in not instructing or warning the plaintiff and his co-employee as to the work and dangers, are for the jury, where it appears that the plaintiff had never run the saw and protested against doing the work for want of experience, but was ordered to do so by the foreman, and where the foreman placed a boy sixteen years of age, who had never worked in a mill before that day, at work with him as an assistant at dangerous work requiring care and judgment, without giving any instructions as to how the work should be done, and plaintiff was injured through the removal, in an improper manner, of material from the saw by the assistant, concerning which no warning or instructions were given either of them.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 10, 1906, on the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for personal injuries sustained by an employee in operating a saw. Affirmed.

R. S. Eskridge (*Philip Tindall*, of counsel), for appellant.
Govnor Teats, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries. There was testimony to support the following facts: The defendant is a manufacturer of boxes, and among other things, it makes grape boxes from veneer. In

[1]Reported in 91 Pac. 555.

the process of making grape boxes, it cuts two ventilators in each end of the veneer with a ripsaw. The veneer is cut into strips from sixteen to eighteen inches in length, and of proper width for making into boxes. Several hundred of these strips are then tied into a bundle and, with the strips standing on end, the bundle is from sixteen to eighteen inches high, and of equal or greater length across the table. After they are tied up, the bundles are taken to a ripsaw table for the purpose of cutting the ventilators. The guide of the ripsaw table is placed at the proper distance from the saw, and while the bundle stands upon the ends of the strips, it is pushed by the operator across the saw which cuts the ventilators. All guards are removed from the saw, and it is left fully exposed, this being necessary in order to cut the slits for ventilating purposes. The saw is exposed above the table about an inch and a half or two inches, which is the depth of the slits cut in the veneer.

Two persons are required to handle the bundles during the operation of sawing the ventilators. One stands at the front of the saw, and pushes the bundle along over it. The other stands in the rear, receives the bundle as it comes over the saw, and then passes it back to the one in front, who runs it over the saw again to cut another row of ventilating slits. The saw revolves toward the one in front, who adjusts the bundle to the guide and then pushes it over the saw, leaning forward as the bundle moves from him across the table. As he pushes, both hands are upon the bundle and his face is downward until the top of the saw has cleared the bundle, when the other party, who is called an "offbearer," takes it, as aforesaid. At this juncture the operator's right hand is immediately over the saw. As the saw emerges from the edge of the bundle next to the operator, it begins to throw dust and, to protect his eyes, he pulls his hat down over them, and this obstructs his view of the offbearer. Considerable force is required to push the bundles over the saw, inasmuch as they range in weight from thirty to sixty pounds. Care is required

of the offbearer in taking the bundles away from the saw. If the bundle is jerked from the operator while he is in the position above described, his hand is liable to fall down upon the saw.

The plaintiff had worked now and then around machinery for several years, but had never done the kind of work above described, he being but eighteen years of age at the time of the accident. On the day of the accident, a boy by the name of Griffin applied to the defendant for work. He was about sixteen years of age, and weighed about one hundred pounds. He had never before worked in a mill. During the forenoon of that day, Griffin worked taking away material from an ordinary ripsaw which the plaintiff was running. The work was simple, as he merely carried away the stuff as it was ripped. During that time he now and then put sticks on top of the saw which were thrown toward the plaintiff, until plaintiff asked him to stop it, Griffin apparently not realizing the danger that might result from such amusement.

During the afternoon of that day, the foreman of that department went to the plaintiff and ordered him to operate the veneer ventilating saw heretofore described. The plaintiff objected, saying he had never done that work and did not understand it. The foreman replied that they had a big order and that the plaintiff must take up that work. At the same time he ordered the boy Griffin to act as offbearer for the plaintiff, the duties being as heretofore described. The foreman said: "You want to be careful and don't get your mits in here. If you do, you are liable to get them whacked off. I got a couple of fingers cut off ventilating this stuff." He also said to the plaintiff to be careful, and he ran one bundle through the saw. It was testified, however, that he did not show the boy Griffin how his work should be done, or otherwise warn or instruct him.

The boys proceeded with the work until about half past four o'clock in the afternoon, when the plaintiff was passing a bundle over the saw. It had almost reached the point where

the plaintiff was to let go of it, his hat being pulled over his eyes to protect them from the dust, when Griffin quickly jerked the bundle away, and the plaintiff's hand fell upon the saw, whereby it was severely cut and torn, leaving permanent injuries. The plaintiff looked up and Griffin still held the bundle. Plaintiff looked at his hand and made some exclamation, when Griffin became frightened and ran away. There is really but little dispute about the foregoing facts, and in any event there is sufficient evidence to sustain all that is above stated. The cause was tried before a jury, and a verdict was returned for plaintiff in the sum of $2,500. Judgment was entered for that sum, defendant's motion for new trial was denied, and it has appealed.

The errors assigned are that the court refused to take the case from the jury at the close of respondent's evidence, and again at the close of all the evidence; also that appellant's motions for judgment notwithstanding the verdict and for new trial were denied. These assignments all involve the sufficiency of the evidence to establish the liability of appellant. Appellant, by its answer, not only denied negligence on its own part, but pleaded contributory negligence on respondent's part, and also alleged that the accident was due to the negligence of a fellow servant, and that respondent assumed the risk. The question of contributory negligence under such evidence as was submitted here was clearly for the jury, as has been repeatedly held by this court. Perhaps in an ordinary case the court might have concluded under this evidence that the proximate cause of the accident and injury was the negligence of the fellow servant, and that it was, therefore, a mere question of law for the court, and not one involving facts for the jury. The circumstances shown in evidence were, however, not usual. Here was a dangerous saw, revolving at great speed, in an exposed position. The exposure seems to have been necessary in order to accomplish the work as designed. Common experience would seem to suggest that about

such a dangerous machine and situation only thoughtful persons of mature and deliberate judgment should be permitted to work. In any event, if young persons without maturity of mind and without experience are employed, it follows with equal force that they should be carefully shown how the work should be done, and fully warned against the dangers of failing to follow instructions.

Here was a young man eighteen years of age, who had been employed at other work in the factory. The foreman ordered him to forthwith take charge of this ventilating saw. He remonstrated on the ground of lack of experience, but he was commanded to proceed at once with the work. A boy sixteen years of age, who had never worked in a mill before that day, was ordered to take the position at the other side of the saw and discharge the duties heretofore described. This boy was not instructed as to his duties, and was not warned of the danger that might result to his working companion under such circumstances as have been detailed. That he was not a boy of deliberate or mature mind is not only indicated by his youth, but also by other facts. In the forenoon of that day he, for amusement, threw sticks upon the ripsaw to see them whirled away. These were thrown near the face of respondent, who narrowly escaped injury therefrom. Again, when respondent was injured, the young boy became alarmed and ran away. Such facts indicate extreme boyishness, and lack of judgment or experience sufficient for the responsible position he was directed to fill. If it be said that appellant had not actual knowledge of these boyish traits, it may also be said that such traits may reasonably be expected in all boys of that age, unless by actual experience certain boys may have demonstrated more serious, thoughtful, and mature judgment. Perhaps a person older than respondent might have refused to work with such an inexperienced boy at such a place, but respondent was himself a mere boy. He had not done this work before and perhaps did not realize the danger of such a situ-

ation as arose. Moreover he was required by his employer to act quickly and without time for deliberation. It should not therefore be said, as a matter of law, that he assumed the risk and, under such circumstances, we think it was properly for the jury to determine whether appellant was negligent in placing so young and inexperienced a person at work at that place; whether it neglected to properly instruct him how to safely do the work, or to warn both him and the respondent of the incidental danger; and also whether the injuries of the respondent were primarily traceable to such negligence. The court submitted these questions to the jury, and the verdict established the negligence of appellant.

Neither party has cited in the briefs any authorities touching any question involved. The facts are such as lead us into the realm of fundamental principles which operate, or should operate, between men. Legal precedents are not necessary where the consciences of ordinary and reasonable minds universally accept certain principles as fundamentally right and just. Such minds intuitively believe that, if an employer assumes to employ children or persons of extreme youth and inexperience about dangerous machinery, even if the act of employment in a given case is not itself negligence, it is at least negligence for the employer not to first inform himself as to the experience and capability of the youth to cope with the particular situation, or to fail to properly and carefully instruct him about his work, or to warn him against impending danger to himself and others.

In *Kirby v. Wheeler-Osgood Co.*, 42 Wash. 610, 85 Pac. 62, this court, however, discussed to some extent the rules for determining whether an employer has been negligent in the employment of children and young persons. Within what is there said, it was not for the court under the facts in this case to determine as a matter of law that appellant was not negligent. Under instructions, the court properly submitted all questions of negligence to the jury, and the jury having

found that appellant was negligent in the premises, the verdict should be sustained for the foregoing reasons.

The judgment is affirmed.

CROW, MOUNT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

[No. 6914. Decided September 9, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Gideon A. LaFurgey, Plaintiff*, v. THE SUPERIOR COURT FOR MASON COUNTY, *Respondent*.[1]

PROHIBITION—TO COURTS—ADEQUATE REMEDY BY APPEAL—CHANGE OF VENUE. Prohibition does not lie to prevent the trial of a cause after erroneously refusing to grant a change of venue, whereby the court has no further jurisdiction; since there is an adequate remedy by appeal, which is not affected by the fact of delay or expense not ultimately destroying the effectiveness of the judgment.

Application filed in the supreme court September 4, 1907, for a writ of prohibition to prevent the trial of a cause, after denial of an application for a change of venue. Denied.

Eugene Carr and *N. Soderberg*, for relator.

Frank D. Nash, for respondent.

HADLEY, C. J.—Original application was made to this court for a writ of prohibition, directed to the superior court of Mason county. The application shows that, in a certain cause now pending in said court, the relator is defendant, and that an order granting a temporary injunction against him was entered therein; that the action is one for the cancellation of a contract and for an accounting between the parties; that it is a transitory and not a local action, and is properly triable in Pierce county, where the relator herein, who is sole defendant in that action, resides; that within the time prescribed

[1]Reported in 91 Pac. 639.

by law, the relator, as defendant in said action, served and filed his demurrer to the complaint in the cause; that with the demurrer he also served and filed an affidavit of merits, showing the place of his residence as aforesaid, and demanding in writing that the cause be forthwith transferred to Pierce county for trial; that the demand was denied, and thereafter an answer was filed and the temporary injunction aforesaid was issued; that thereafter, over the objection of relator, the court assigned the cause for trial in Mason county on the 11th day of September, 1907; and that, unless prohibited by this court, the trial court will proceed to try the cause at said time; that the said court is without jurisdiction of the relator and of the subject-matter. It is also shown that an appeal from the order granting the temporary injunction is now pending in this court.

Relator's contention is that the trial court of Mason county is without jurisdiction for the reason that the action is transitory, and has been commenced in the wrong county; that is to say, in a county where the sole defendant does not reside, timely objection to the jurisdiction having been made and not subsequently waived. He therefore contends that, by reason of the absence of jurisdiction, this court should now prohibit the trial court from proceeding with the trial. The later decisions of this court are against relator's contention. In *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, it was held that prohibition does not lie to prevent the trial court from proceeding to try a cause, even if the court is without jurisdiction by reason of the erroneous denial of an application for a change of venue, for the reason that there is an adequate remedy by appeal, which is the test to be applied upon all applications for extraordinary writs. It was also held that the delay and expense incident to an appeal do not affect the adequacy of the remedy. See, also, *State ex rel. Port Orchard Investment Co. v. Superior Court*, 31 Wash. 410, 71 Pac. 1100.

Relator, therefore, has his remedy by appeal, and under the above decisions such remedy cannot be held to be inadequate. Moreover, he has already appealed, and by stipulation the briefs in the appeal are submitted for our consideration in the cause now before us. From those, we are advised that the lack of jurisdiction to issue the temporary injunction is the chief ground of the appeal. Relator is entitled to one submission of that question here and no more. The law has provided that it may be done by appeal, and he must be restricted to that remedy, since it is not inadequate to afford him relief. The fact that the remedy by appeal may subject him to inconvenience and expense does not destroy its effectiveness to ultimately reach any unauthorized action the trial court may take.

The writ of prohibition is denied.

RUDKIN, CROW, and MOUNT, JJ., concur.

[No. 6558. Decided September 11, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Fred Martin, Appellant,* v. J. D. HINKLE, *Police Justice of Spokane, Respondent.*[1]

PROHIBITION—OTHER ADEQUATE REMEDY—VALIDITY OF ORDINANCE. Prohibition does not lie to prevent a trial for the violation of a city ordinance, which is claimed to be void; since there is an adequate remedy by appeal or by writ of *habeas corpus*.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered September 6, 1906, denying a writ of prohibition to restrain a justice from further proceeding with the trial of a cause. Affirmed.

[1]Reported in 91 Pac. 640.

Happy & Hindman and *Sullivan, Nuzum & Nuzum*, for appellant.

J. M. Geraghty and *Lester P. Edge* (*J. D. Campbell*, of counsel), for respondent.

PER CURIAM.—The appellant was complained against in the police court of the city of Spokane for keeping his place of business open on Sunday, in violation of a city ordinance. Upon being arrested and brought before the police justice for trial, he applied to the superior court of Spokane county for a writ of prohibition, to restrain the police justice from further proceeding with the trial of the cause. From an order denying the writ, the present appeal is prosecuted.

The only question presented by the appeal is thus stated in the appellant's brief: "Had the municipal corporation of Spokane authority and power to pass an ordinance which denounces an act to be an offense or crime when the same act is also made an offense under the general statutes of the state, in the absence of a statute granting to the municipality the specific power to do so?"

Manifestly questions of this kind cannot be determined on an application for a writ of prohibition. Such writs will only issue to arrest the proceedings of a tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person, and where there is no plain, speedy and adequate remedy in the ordinary course of law. Bal. Code, §§ 5769, 5770 (P. C. §§ 1422, 1423); *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, and cases cited. In this case the appellant had an adequate remedy in the ordinary course of law, either by appeal from an adverse judgment or by application for a writ of habeas corpus. The application for the writ was properly denied, and the judgment is therefore affirmed.

[No. 6700. Decided September 11, 1907.]

IREDELL S. STONE *et al.*, *Appellants*, v. H. L. MOODY *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER — RESCISSION BY VENDORS — FRAUD—EVIDENCE—SUFFICIENCY. In an action for the rescission, by vendors, of a contract for the sale of land, the evidence is sufficient to show that plaintiffs had been overreached by the fraudulent practices of the defendant, where it appears that defendant persuaded them to sign a receipt for $22,500, as a cash payment, upon defendants entering into a contract to resell a portion of the land for that sum, by which receipt the balance of the land sold was released from the conditions of the sale, while the defendant induced them to believe that the receipt had no such effect, and was not a receipt for a cash payment, it being unreasonable and inexplicable that the plaintiffs would have signed such a receipt except under the understanding represented to them by the defendant.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 8, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to rescind a contract for the sale of land. Reversed.

M. F., *T. P.*, and *C. C. Gose*, for appellants.

W. H. Winfree, for respondents.

ROOT, J.—This case was here once before, and may be found reported in 41 Washington, page 680, 80 Pac. 617, to which reference is made for a more complete statement of the facts involved. Upon the first trial a motion for nonsuit was made at the close of plaintiffs' case, and no evidence was introduced by defendants. The court having sustained the latter's motion, dismissed the action. This court reversed the judgment and remanded the case for a new trial. Upon the second trial both plaintiffs and defendants introduced evidence. The trial court made findings and conclusions in favor of defendants

[1]Reported in 91 Pac. 644.

and entered judgment and decree thereupon. From this the present appeal is prosecuted.

Appellants maintain that they did not know that the contract contained the provision requiring them to accept as cash any contracts of sale which respondent Moody might make of portions of the land to other persons. Taking into consideration the extraordinary character of this provision, the opportunity which it would afford for fraud, and considering the matter in the light of all the evidence adduced, we are satisfied that they did not know that said provision was in the contract. Subsequently when they signed the receipt for $22,500, on February 27, 1904, they learned that the provision above referred to was in the contract which they had signed. Moody having sold or pretended to sell a portion of the land to one Heller for $22,500, upon terms, requested appellants to sign a receipt for such sum as if the same were a cash payment. At first they declined to do so and asked time to take legal counsel concerning the same. They testified that Moody refused to give them any time, but threatened to bring action against them at once for heavy damages in case they did not immediately sign the contracts to Heller and the receipt in question; that he thereupon proceeded to explain to them that they did not understand the matter aright; that it was merely a matter of form, and did not deprive them of the right to receive full payment in cash before parting with title to the land; that he had made a sale to Heller, and it was necessary to have the contracts and this receipt signed in order that Heller, upon making full payment, would be entitled to get a deed from them; that he intended to deal rightly and honestly by them, and that this was not a receipt for cash but merely for the contracts which had been entered into by Heller, and that it was not intended to prevent them from getting full payment in cash before deeding the property.

They also testified that they did not understand in signing the receipt that it was as a receipt for cash, but were told by

Moody, and supposed and believed, that it was merely a receipt for the contracts with Heller; that they signed the receipt with the express understanding that it was merely a receipt for the contracts and a matter of form that was necessary to be gone through in connection with respondent's deal with Heller, and not intended as evidence of a cash payment to them, and that they did not receive the Heller contracts as equivalent to a cash payment, nor intend to give credit upon their contract with Moody for the sum of $22,500, or any sum whatsoever, by reason of said Heller contracts; that they relied upon the explanation and interpretation of the contract as thus given by Moody, and received the Heller contracts and signed the receipt only upon the understanding that their contract bore the interpretation which he had thus assured them of.

We are satisfied that the contention of the appellants is substantially correct. It is almost inconceivable that appellants would have signed the contract had they known it contained the clause requiring them to accept, as cash, contracts that respondent might make for the sale of certain portions of the land. That appellants, after discovering that the contract had this clause, would sign a receipt such as they did on February 27, 1904, with the purpose and intention of thereby giving respondent Moody a credit of $22,500 upon the purchase price for the lands sold by them, when they received no cash but only the contracts for the purchase of a portion of the land, would be a most remarkable circumstance. It would be unreasonable and inexplicable unless done under some such understanding as that testified to by appellants.

It appears from the evidence that Heller has paid nothing to appellants on the contracts made to him. Appellants have received only $1,500 on account of the sale to Moody.

The judgment of the honorable superior court is reversed and this cause remanded with the following instructions: Within ninety days from the filing of the remittitur with the

clerk of the superior court, the respondents may file with the clerk of that court a written statement that they accept the contract with appellants with the elimination of the clause requiring appellants to accept as cash, or give them credit for as cash, the Heller contracts, or any other contracts made, or to be made, for the sale of any portion of the land involved; and that they will accept such contract with appellants with the interpretation that the payments therein provided for shall be made by or for them at the times therein provided, in cash. If respondents file this statement in the manner indicated and shall, within said ninety days, pay to the clerk of the court for the benefit of these appellants the amount of all payments with interest thereon due under said contract up to said time, then said contract shall remain in force and effect with the interpretation as herein given. If respondents do not file such statement, or do not within said ninety days pay into said court for appellants the amount of payments and interest due up to said date, then the trial court shall enter an order and decree annulling and cancelling the contract entered into between appellants and respondents concerning said land, and appellants shall pay in to the clerk of that court, for respondents, all money, with interest, paid by respondents to appellants on account of such contract, less the amount of taxable costs allowed in this action to appellants against respondents. Appellants shall make said payment to the clerk of the court within ten days from the expiration of the ninety-day period hereinbefore mentioned.

HADLEY, C. J., FULLERTON, MOUNT, CROW, DUNBAR, and RUDKIN, JJ., concur.

[No. 6677. Decided September 11, 1907.]

ADVANCE THRESHER COMPANY, *Appellant*, v. JOHN M. SCHIMKE, *Respondent*.[1]

ATTACHMENT—WHEN ISSUES—WHILE PROSECUTING FORECLOSURE—CHATTEL MORTGAGES. In an action brought to foreclose a chattel mortgage, an attachment cannot be issued and levied upon other property, in anticipation of an unknown deficiency, in view of Bal. Code, § 5893, providing that the plaintiff shall not prosecute any other action for the same matter while he is foreclosing his mortgage.

Appeal from an order of the superior court for Lincoln county, Warren, J., entered October 30, 1907, upon motion of the defendant, dissolving a writ of attachment issued during the pendency of an action to foreclose a mortgage. Affirmed.

Martin & Wilson and *W. M. Nevins*, for appellant.

Neal, Sessions & Myers, for respondent.

CROW, J.—On August 27, 1906, the plaintiff, Advance Thresher Company, a corporation, sold to the defendants, John M. Schimke and Fred Knoblich, certain farm machinery. To secure the purchase price the defendants executed and delivered to the plaintiff two notes, for $855 and $775, falling due October 1, 1906, and October 1, 1907, together with a chattel mortgage on the machinery and other personal property. On October 30, 1906, the plaintiff commenced this action to foreclose its mortgage, and forthwith caused a writ of attachment to be issued and levied upon property of the defendant Schimke other than that described in the mortgage. The trial court, upon motion of defendant Schimke, entered an order dissolving the attachment, and the plaintiff has appealed.

[1]Reported in 91 Pac. 645.

The controlling question before us is whether, in an action to foreclose a mortgage, a writ of attachment may be issued before judgment. Bal. Code, § 5893 (P. C. § 1279), [made applicable to chattel mortgage foreclosures by Bal. Code, § 5879 (P. C. § 1283)], reads as follows:

"The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor shall he prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure."

Appellants contend, (1) that an attachment may issue in an equitable action, citing *Bingham v. Keylor*, 19 Wash. 555, 53 Pac. 729; and (2) that the attachment being a provisional remedy, ancillary to the main action, is not another action for the same debt, in contemplation of § 5893. While in *Bingham v. Keylor, supra*, which was an action for the dissolution of a partnership, an accounting, and the appointment of a receiver, it was held that an attachment might issue in an equitable action, in so holding we said:

"Where the object of the action is to dissolve a partnership and for an accounting, and it is shown that upon such accounting a balance will be due the plaintiff, we perceive no reason why the plaintiff may not have an attachment, *provided, of course, he can and does specify in his affidavit the amounts of the indebtedness* and some statutory ground for attachment."

There the affidavit alleged the exact amount of indebtedness, which was on an unsecured claim. Here the appellant by foreclosure is primarily subjecting the mortgaged property to the payment of secured notes. It claims no remedy under the writ of attachment until it shall first exhaust the property covered by its mortgage. It does contend, however, that by reason of the inadequate value of the mortgaged property, it will be entitled to a deficiency judgment for at least $500, and that it is now entitled to a writ of attachment in advance of

such judgment, to secure the same. It cannot know that the contingency of a deficiency judgment will ever arise, for while it may be unwilling to bid the full amount of its claim at foreclosure sale, some other person may do so. Although appellant has by contract extended credit to respondents on the notes and mortgage, it is now pursuing two remedies at one and the same time, one by foreclosure on the mortgaged property, and the other by attachment of additional property to secure a possible deficiency judgment. How can it, in advance of such deficiency judgment, which it may never obtain, comply with Bal. Code, § 5351 (P. C. § 511), which requires that the affidavit for attachment shall specify the amount of indebtedness? While it is true that, strictly speaking, an attachment is not a separate action, but an ancillary proceeding, it would, if resorted to before judgment, be an additional remedy not contemplated in foreclosure proceedings under our statutes. The evident spirit and intent of § 5893 was to prevent plaintiffs from harassing defendants, in foreclosure actions, with ancillary proceedings prosecuted before judgment, for the purpose of seeking additional and concurrent remedies other than those authorized by statute, or arising in the usual course of procedure. It was to prohibit a mortgagee securing, by writ of attachment or otherwise, an additional remedy in anticipation of a deficiency judgment, while looking to the mortgage security, and before exhausting the same by foreclosure and sale.

In *Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748, it was contended that a mortgagee could not by attachment pursue an independent remedy for the collection of the mortgage debt while foreclosing. The validity of the attachment was not raised in the original foreclosure proceeding in which the writ had issued, but was raised in a collateral action, being the one then on appeal. In passing upon the appellant's contention we said:

"The second [contention] is based upon § 5893 of the Code (Ballinger's). It is there provided that a mortgagee

shall not 'prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure.' Doubtless this provision of the statute would have furnished a sufficient ground for dissolving the attachment, had it been urged in the foreclosure action; and perhaps it might have furnished a ground for reversing the foreclosure judgment, had an appeal therefrom been taken. But such proceedings were voidable, not void, and to attack them in this way is to attack the judgment collaterally, where error, merely, cannot avail."

Here the respondent moved the trial court to dissolve the attachment, on the ground that it was issued while the appellant was proceeding with the foreclosure of its mortgage. In view of the inability of the appellant to anticipate the exact amount of any deficiency judgment to which it may or may not be hereafter entitled, or to state the same in its affidavit for attachment, and in view of our construction of § 5893, we hold that the trial judge rightfully sustained the motion to dissolve.

The judgment is affirmed.

HADLEY, C. J., RUDKIN, and MOUNT, JJ., concur.

[No. 6845. Decided September 13, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Skamania Boom Company, Plaintiff*, v. THE SUPERIOR COURT FOR SKAMANIA COUNTY, W. W. MCCREDIE, JUDGE, *et al., Respondents.*[1]

EMINENT DOMAIN—LAND DEVOTED TO PUBLIC USE—REASONABLE NECESSITY. A railroad company has the power to condemn a right of way across the lands of a boom company already devoted to a public use, if a reasonable necessity exists therefor; and such necessity is shown where it appears that to go around the defendant's lands would necessitate the building of the road out in the Columbia river, in a strong current, which would be unsafe and very expensive, while the use of defendant's lands as a holding ground for logs would not be entirely destroyed by the condemnation, and there had been occasion for such use only for a few weeks during the last eight years.

SAME—PROCEEDINGS—CONDITIONS PRECEDENT. Under Bal. Code, § § 4334, 4335, it is not a condition precedent to condemnation proceedings by a railroad company (except in case of railroad crossings) that the company should attempt to agree with the owner as to the compensation to be paid for land already devoted to a public use.

SAME. An attempt to agree with the owner as to compensation is not a condition precedent to condemnation proceedings, where it appears that such attempt would be fruitless.

Certiorari to review an order of the superior court for Skamania county, McCredie, J., entered June 28, 1907, after a hearing on the merits, adjudging a public use and directing the assessment of damages in a condemnation proceeding. Affirmed.

George S. Shepherd and *Helmus W. Thompson*, for relator.

James B. Kerr and *A. L. Miller* (*L. C. Gilman*, of counsel), for respondents.

HADLEY, C. J.—A writ of review was issued by this court for the purpose of reviewing the action of the superior court

[1]Reported in 91 Pac. 637.

of Skamania county in certain condemnation proceedings. The action in the trial court was initiated by the petition of the Portland & Seattle Railway Company against the Skamania Boom Company and others. The said petitioner and also said boom company are corporations, organized under the laws of this state, the former for railway purposes and the latter for booming purposes. The petitioner has surveyed and located a line of railroad and is now engaged in the construction thereof down the north bank of the Columbia river, from a point at or near Kennewick, Washington, to Vancouver, Washington, and thence across said river to Portland, Oregon, which railroad it proposes to build and operate as a common carrier of freight and passengers. It claims that, for the purposes of the construction and operation of said railroad, it is necessary to condemn and appropriate for its use as a right of way a certain strip of land two hundred feet in width, being one hundred feet on each side of the center line of the railroad as now located, across a tract of land owned by the said boom company. A preliminary hearing was had and the court found that it is necessary for the petitioner to condemn and appropriate said strip of land for its use as a right of way, that the contemplated use is a public use, and that the public interest requires the appropriation of the land for said railway purposes. It was ordered that a jury should be impaneled for the purpose of ascertaining the damages resulting from such appropriation. The boom company thereupon filed its petition here as relator, and asked the writ of review. Meanwhile the trial of the question of damages has been suspended.

The situation is substantially as follows: The relator owns a tract of land containing about thirty-eight acres, lying upon the east bank of Wind river and a short distance to the north of the confluence of said stream with the Columbia river. The relator's plat or survey as a boom company, filed in the office of the secretary of state of the state of Washington, and which shows so much of the shore line of the waters of Wind

river and lands contiguous thereto as are proposed to be appropriated by said boom company as necessary for its purposes, embraces the said tract. The location of the railway line is about the center of this tract, considered from the north to the south, and crosses the tract in an easterly and westerly direction, leaving practically equal parts of the tract to the north and south of the right of way strip sought to be appropriated. The relator claims that it needs this entire tract as a holding ground for logs in times of high water; that when the waters of the Columbia are high the logs cannot be handled at the mouth of Wind river, and that the waters are forced up Wind river which overflows the tract in question, forming a holding ground for the logs. The testimony shows that, during a period of eight successive years, the relator has actually used the ground twice in connection with handling logs. Each time the period of such use covered a few weeks by reason of the fact that the land was covered by water. So far as the evidence shows, the land at all other times during the eight years has either been entirely uncovered by water or has not been under sufficient water to be used for logging purposes. It further appears that, at the two times named, the use that was made of the ground was for brailing or sorting logs. Under such circumstances, the relator claims that the tract in question has been devoted to a public use; that the relator is a public service corporation; having previously devoted the land to a public purpose, and that the railway company cannot condemn it for another public purpose.

Assuming, without deciding, that the facts in evidence are sufficient to show that the tract had been actually appropriated by the boom company for a public use, still the strip sought to be taken by the railway company constitutes but a small part of the entire tract said to be devoted to the public purpose. The case is, therefore, not that of one public service corporation seeking to deprive another such corporation of its entire means of operation at a given location. Both to the north and south of the strip sought to be condemned is room remain-

ing. In whatever manner the railway may be built across the tract, whether upon unfilled trestle work or with a filled embankment, the bed of Wind river must in any event remain open and unobstructed through which the back water may flow and then overflow the tract upon both sides of the railroad. Within the principles discussed in *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670, the power exists for one public service corporation to condemn property held by another. Such power may not be exercised arbitrarily or indiscriminately so as merely to take property away from one corporation and give it to another. It cannot be taken to be used for the same purpose in the same manner; but where there is a necessity for devoting it to some other public service, it may be condemned. As to the degree of necessity which must exist, there is difference of opinion. Some courts have held that the necessity must be an absolute one, but the weight of opinion is that it must be a reasonable necessity. Lewis, Eminent Domain (2d ed.), § 276.

The same section says:

"But we should say that there was a reasonable necessity for the taking where the public interests would be better subserved thereby, or where the advantages to the condemnor will largely exceed the disadvantages to the condemnee."

To the same effect the relations of a condemning corporation to the property of another arising from reasonable public necessity were discussed by this court in *State ex rel. Portland & Seattle R. Co. v. Superior Court*, 45 Wash. 270, 88 Pac. 201.

It being established that the power to condemn exists in favor of the railway company as against the relator if a necessity exists, we must next inquire if a reasonable necessity does exist. The trial court found that it does, and we think the evidence sustains the finding. The relator contends that a line which it proposes to the south of its tract of land would be a practicable route, and that by its adoption the appropriation

of any portion of relator's tract would be avoided. The evidence does not show that it would be impossible to construct and maintain upon the proposed line, but it does show that the water line of the Columbia river extends a long distance beyond the proposed location, and from a profile shown on the map filed, it appears that the track would have to be supported by a high fill or trestle. It is the relator's own contention that the current of the river at this point is such that in times of high water it cannot handle its logs there, and hence it claims the necessity for the ground sought to be condemned in order that it may hold its logs upon it at such times. The relator's own argument shows that its proposed route for the railway would require the construction and maintenance of the line within this same current, making it necessary to operate freight and passenger trains upon some kind of structure that must resist the force of the current. The safety of the lives of passengers and the careful transportation of freight constitute great public necessity, and the public cannot reasonably be subjected to the hazards attending the proposed location, when they may be avoided by the use of a strip of relator's land. It also appears that the construction and maintenance upon the proposed route would be very expensive. While this may not of itself be a sufficient reason for taking relator's property, unless it amounts to a practical prohibition, yet when it is considered in connection with the other elements mentioned, the comparative expense is not an improper matter for consideration in determining as a whole the reasonableness of the appropriation. All the circumstances taken together, tested by the standards above mentioned, show a reasonable necessity for the appropriation.

It is also urged that the court erred in giving judgment for condemnation, for the reason that it was not shown that any effort was made to agree with the relator upon the amount of compensation prior to instituting the condemnation proceeding. By reference to Bal. Code, § 4334 (Laws 1903, p.

383), it will be seen that extent of the right of appropriation in general on the part of a railway company is there stated, and it is not made a condition precedent to the bringing of condemnation proceedings that a prior attempt to agree upon compensation shall be made. Section 4335 (P. C. § 7090), does contemplate that, when one railway company seeks to condemn a way for a crossing over the tracks of another railway company, an effort to agree upon the compensation shall first be made. Relator argues that, by analogy, that section should apply here, for the reason that this is the case of a railway company seeking to condemn a crossing over the property of another public service corporation. The statute in its terms is confined to the case of two railway companies, and we are not authorized to extend its operation to other cases. In any event, even if it were construed as relator contends, this record shows that the relator wholly denies the right or power to condemn at all in this instance, and an effort to agree upon damages under such circumstances would have been fruitless. The case is therefore analogous to the absence of a tender of performance of an obligation when the facts show that a tender would have been fruitless. In such a case the tender may be excused. Under either view of the statute relator is not entitled to urge this point.

The judgment as to the necessity for appropriation is affirmed, and the order of this court suspending further proceedings is hereby vacated.

RUDKIN, CROW, and MOUNT, JJ, concur.

[No. 6843. Decided September 17, 1907.]

THE CITY OF SEATTLE, *Respondent*, v. C. FOSTER, *Appellant*.[1]

INTOXICATING LIQUORS—SALES—STATUTES—IMPLIED REPEAL. The pharmacy act, Laws 1899, p. 222, relating to the drug business and authorizing the sale of spirituous liquors by druggists for medical purposes without a license, does not impliedly repeal Bal. Code, § 2937, relating to the sale and disposal of intoxicating liquors and requiring sales by druggists for medical purposes to be upon the written prescription of a reputable physician; since repeals by implication are not favored, and this rule has special application where the laws relate to different subjects.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 6, 1907, upon a trial and conviction of the crime of selling intoxicating liquors without a license. Affirmed.

Morris, Southard & Shipley, for appellant.

Ellis DeBruler, for respondent.

RUDKIN, J.—The appellant Foster was convicted of the crime of selling intoxicating liquors without a license, in violation of an ordinance of the city of Seattle, and from the judgment of conviction the present appeal is prosecuted.

The case was submitted to the court below upon an agreed statement of facts, the material parts of which are as follows: The appellant conducted a pharmacy in the city of Seattle for the compounding, dispensing and sale of drugs, medicines, poisons, wines, and malt and spirituous liquors, under the pharmacy laws of the state. On the 20th day of September, 1906, he sold to Mrs. John Kelly two bottles of malt liquor, the purchaser stating at the time of purchase that she purchased the same for medical purposes. At the time of the sale the appellant kept in his place of business a registry book in which he entered the name of the purchaser,

[1]Reported in 91 Pac. 642.

the quantity purchased, the date, and for what purpose used, as required by § 15 of the pharmacy act of 1899, Laws 1899, page 222, but such sale was not made on the written prescription of a reputable physician, as provided by § 6 of the act of February 2, 1888, Bal. Code, § 2937 (P. C. § 5718), and by the ordinance of the city of Seattle, nor did the appellant have a license from the city for the sale and disposal of malt liquors.

On these facts the appellant contends that the provisions of the act of February, 1888, and of the ordinance of the city of Seattle, which only authorize druggists and pharmacists to dispense spirituous, fermented and malt and other intoxicating liquors without a license when done in good faith upon the written prescription of a reputable physician, were superseded by the pharmacy act of 1899, *supra*, and that since the passage of the latter act druggists and pharmacists may sell intoxicating liquors without a license, by merely keeping and making the proper entries in the registry book above referred to. With such a contention we are unable to agree. While the pharmacy act of 1899 provides that sale of wines and spirituous and malt liquors may be made by pharmacists and druggists for medical, scientific, mechanical and sacramental purposes without a license, it does not in terms or by implication dispense with the necessity for a physician's prescription or certificate when the liquors are sold to be used for medical purposes. The well-established rule that repeals by implication are not favored in law has a peculiar application here, for the two acts under consideration relate to widely different subjects—the former to the sale and disposal of intoxicating liquors, the latter to the conduct of the drug business. We are firmly convinced that the legislature did not intend to permit a drugstore to become a grogshop by merely keeping a formal record of its sales, and such would be the ultimate effect of upholding the contention of the appellant.

There is no error in the record and the judgment is affirmed.

HADLEY, C. J., CROW, MOUNT, and FULLERTON, JJ., concur.

[No. 6702. Decided September 18, 1907.]

IRVING M. BALLARD *et al.*, *Appellants*, v. SARAH SLYFIELD *et al.*, *Respondents*.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY—WIFE'S SEPARATE PROPERTY—EVIDENCE—SUFFICIENCY. Findings to the effect that certain real estate was separate property of the wife are sustained by the evidence, where it appears that it was purchased in 1875, largely with funds inherited by the wife, and the husband declared that any community property used in its purchase was intended as a gift to the wife, so that the property could be held by her separately; that the wife twice mortgaged the property, finally conveyed it receiving the full consideration, did not include it in her inventory of her husband's estate, and her acts for twenty-five years since her husband's death were inconsistent with any community claim, and no action was begun by the children to recover an interest until more than six years after the youngest attained majority.

Appeal from a judgment of the superior court for King county, Morris, J., entered November 12, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

F. A. Gilman, for appellants, contended, among other things, that to deprive the property of its community character, the evidence must be clear and convincing. *Rowe v. Whatcom County R. & L. Co.*, 44 Wash. 658, 87 Pac. 921; *Weymouth v. Sawtelle*, 14 Wash. 32, 44 Pac. 109; *Coats v. Elliott*, 23 Tex. 606; *DeSentmanat v. Soule*, 33 La. Ann. 609. The name of the spouse in whom the title stands is of no moment in deciding its character. *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398; *Mabie v. Whittaker*, 10 Wash. 656,

[1]Reported in 91 Pac. 642.

39 Pac. 172; *Schmeltz v. Garey*, 49 Tex. 49. The defendants were not *bona fide* purchasers. *Adams v. Black*, 6 Wash. 528, 33 Pac. 1074; *McComb v. Spangler*, 71 Cal. 418, 12 Pac. 347; *Holyoke v. Jackson*, 3 Wash. Ter. 235, 3 Pac. 841. It was the duty of the surviving spouse as administrator to pay the taxes and preserve the property pending administration. *Noble v. Whitten*, 38 Wash. 262, 80 Pac. 451; *Ryan v. Ferguson*, 3 Wash. 356, 28 Pac. 910; *Lawrence v. Bellingham Bay etc. R. Co.*, 4 Wash. 664, 30 Pac. 1099; *Tucker v. Brown*, 9 Wash. 357, 37 Pac. 456; *Hill v. Young*, 7 Wash. 33, 34 Pac. 144; *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648. Her possession was not adverse or hostile to the children and family. *Taylor v. Taylor* (Tex. Civ. App.), 26 S. W. 889; *Griffin v. Waters*, 1 Rob. (La.) 149; *Clemons v. Clemons* (Tex. Civ. App.), 45 S. W. 199; *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982; *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330; *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30.

Harold Preston and *Hastings & Stedman*, for respondents, contended, *inter alia*, that when a conveyance is made to a wife, the presumption that it is community property is not as strong as when conveyed to the husband. *Read v. Rahm*, 65 Cal. 343, 4 Pac. 111; *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394; *Peck v. Vandenberg*, 30 Cal. 11. There was sufficient evidence to establish the intent that the wife should take the property as separate property. *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819; *Peck v. Brummagim*, 31 Cal. 441; *Ingersoll v. Truebody*, 40 Cal. 603; *Higgins v. Higgins*, 46 Cal. 259; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695; *Flournoy v. Flournoy*, 86 Cal. 286, 24 Pac. 1012, 21 Am. St. 39; *Wright v. Wright* (Cal.), 41 Pac. 695; *Hamilton v. Hubbard*, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860; *Hoeck v. Greif*, 142 Cal. 119, 75 Pac. 670; *Smith v. Boquet*, 27 Texas 507; *Peters v. Clements*, 46 Tex. 114; *Baldridge v. Scott*, 48 Tex. 178; *Baker v. Baker*, 55 Tex. 577.

RUDKIN, J.—Irving Ballard and Lucinda M. Ballard intermarried on the 20th day of December, 1870, and continued to reside together as husband and wife until the death of the husband, in the city of Seattle, on December 30th, 1880. On the 15th day of April, 1875, Edward A. Thorndyke and wife conveyed the property now in controversy to Lucinda M. Ballard, the wife of Irving Ballard. The present action was instituted on the 30th day of January, 1906, by the heirs at law of Irving Ballard, deceased, against the grantees of Lucinda M. Ballard, to quiet title to an undivided one-half interest in the property, and to recover the rents and profits for the six years next preceding commencement of the action. The defendants had judgment below and the plaintiffs appeal.

The court found, among other things:

"That the consideration of said conveyance was the sum of nine hundred dollars then and there paid to the grantors therein by the said Irving and Lucinda M. Ballard. That said sum of nine hundred dollars was made up, either wholly or in large part, of money which was then and there the separate property of the said Lucinda M. Ballard, and which she had previously received as an inheritance from the estate of her maternal grandfather; and the remainder, if any, of said sum was paid out of the community funds of the said Irving and Lucinda M. Ballard. That at the time of said conveyance it was the intention of both the said Irving Ballard and the said Lucinda M. Ballard, then expressed, that the conveyance should operate to vest the title to said property in the said Lucinda M. Ballard as her sole and separate estate, and if any part of the purchase price therefor was paid out of community funds it was then and there the intention of the said Irving Ballard to make a gift thereof to his said wife, and to make a gift to her of said property so far as any part of the consideration therefor may have been contributed out of the community funds, and the deed was made to run to the said Lucinda M. Ballard by the express direction, at the time, of the said Irving Ballard, and said conveyance then and there operated to vest the title to said property in the said Lucinda M. Ballard as her sole and separate estate, and the

title to said property remained thereafter unchanged until the conveyance thereafter to the defendant Sarah Slyfield hereinafter referred to; and thereafter, during his lifetime, the said Irving Ballard regarded, considered and declared said property to be the separate property of his said wife, and at the time of the death of said Irving Ballard he had no right, title or interest in or to, or made any claim, to said property or any part thereof; so that, upon his death, no interest therein passed to the plaintiffs or either of them, nor have the plaintiffs or either of them ever had any interest therein."

This finding of course supports the judgment of dismissal, but the appellants earnestly insist that it is not supported by the testimony. The law governing this class of cases is well settled in all the community property states. Property acquired by purchase during the marriage is presumed to be community property, and the burden rests upon the spouse asserting its separate character to establish his or her claim by clear and satisfactory proof. The difficulties of obtaining proof under the circumstances disclosed by this record are apparent. The property was acquired thirty years before the adverse claim was asserted, one of the parties to the transaction is dead and the other is an adverse witness. The testimony of the surviving wife is of little importance, consisting largely as it does of a disclaimer of knowledge or recollection of either law or facts. But, in so far as it may tend to support the claim of the appellants, it is utterly inconsistent with the acts and conduct of the witness covering the period of twenty-five years since her husband's death. Soon after his decease, she filed a petition for letters of administration on his estate, purporting to contain a list or statement of all his property, but no mention was made of the property in dispute. The same is true of the verified inventory filed. She twice mortgaged the property for her own benefit, and finally conveyed it by warranty deed, receiving the full consideration therefor. The conduct of the appellants was equally inconsistent. No claim against the property was asserted by any or either of

them until six years after the property had passed into the hands of strangers. At the time of the assertion of this claim, the eldest child was thirty-two years of age, or eleven years beyond his majority, and the youngest, a daughter, twenty-four years of age, or six years beyond her majority. When we take into consideration the acts and conduct of the widow and children during all these years, the declarations made by the husband in his lifetime, and all the facts and circumstances in the case, we think the court was fully warranted in making the above finding, and its judgment is accordingly affirmed.

HADLEY, C. J., CROW, FULLERTON, and MOUNT, JJ., concur.

[No. 6752. Decided September 18, 1907.]

ANNA W. BENEKE, *Personally and as Administratrix etc., Appellant*, v. HENRY J. BENEKE, *as Executor etc., et al., Respondents.*[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY—COMPROMISE OF DISPUTED CLAIMS—PAYMENT IN PART WITH COMMUNITY FUNDS. Real estate is not shown to be the community property of a man and his second wife, where it appears that on the death of his first wife he claimed it as his separate estate, and pending suit to quiet his title, brought against his children claiming a half interest as community property, he remarried and he and his second wife gave their note for $5,300 in payment of a $1,300 mortgage on the property, and $1,000 to each of four children, for a release of their disputed claims to the property; that such note was paid in part out of the separate funds of the second wife and in part out of the community funds of herself and husband; the remedy of the second wife being a claim against the separate estate of the husband for moneys advanced by the community to procure the release of the disputed claims against his separate estate.

[1]Reported in 91 Pac. 641.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered October 22, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

W. D. Scott and *H. M. Stevens*, for appellant.

Danson & Williams and *Fred H. Moore*, for respondents.

RUDKIN, J.—In the month of August, 1895, Mary Zander Beneke died, intestate, in Spokane county. At the time of her death she and her husband, Henry Beneke, were possessed of the real property now in controversy, together with other property in Spokane county, all of which was either the separate property of the husband or the community property of the husband and wife. Soon after the death of the wife, a dispute arose between the surviving husband and the four children of the marriage over the distribution of the estate, the surviving husband claiming the whole as his sole and separate property, and the children claiming an undivided one-half interest therein as community property, and as heirs at law of their deceased mother. An action was thereupon commenced by the surviving husband in the superior court of Spokane county against the heirs of the deceased wife to establish title in himself. During the pendency of this action, and on the 19th day of May, 1897, said Henry Beneke and the plaintiff, Anna W. Beneke, intermarried and maintained the relation of husband and wife thereafter until the death of the husband on July 29th, 1905.

Soon after this marriage, Henry Beneke and his children entered into an agreement or stipulation reciting that Henry Beneke claimed all the real estate in process of administration as his sole and separate property; that the children claimed a one-half interest therein as community property; that they deemed it for their best interests to settle their conflicting claims and to have the estate distributed without further delay

or expense; and it was thereupon agreed that the father should pay the sum of $1,000 to each of the four children, and that upon the distribution of the estate, certain described property should be awarded and decreed to each child. A decree of distribution was entered in pursuance of this agreement or stipulation, and the property now in controversy, subject to a mortgage of $1,300, together with certain other property, was awarded to Henry Beneke. Upon the entry of the decree of distribution, Henry Beneke and the plaintiff herein executed their promissory note in the sum of $5,300 to pay each of the four children the sum of $1,000 as agreed, and to take up the $1,300 mortgage already on the property, and the land in controversy was mortgaged to secure the payment of the note. The note was afterwards paid, in part out of the separate funds of the plaintiff, and in part out of the community funds of Henry Beneke and the plaintiff, according to the allegations of the complaint. Henry Beneke died, testate, in Spokane county, on the 29th day of July, 1905, having by will disposed of the property in controversy to certain of his children. This action was thereupon prosecuted in the name of the surviving wife, as administratrix of the community property of herself and her deceased husband, against the executor of the will and the devisees named therein, to recover possession of the property as a part of the community estate. If community property, her right to recover should probably prevail, but if not, it is manifest that her complaint should be dismissed. The court below gave judgment in favor of the defendants, and the plaintiff appeals.

If we concede that the property in dispute was the community property of Henry Beneke and his first wife, we do not understand by what process it was converted into the community property of Beneke and his second wife. In any view of the case, Henry Beneke had an undivided one-half interest in the property as surviving husband, and if it be conceded that he and the appellant purchased the undivided one-half interest belonging to the children, this would not convert the

whole into community property. The utmost that can be said in favor of the appellant is, that the community would have an interest in the property in the proportion that the funds advanced by the community bore to the entire purchase price, under the decision of this court in *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211. But what would that interest be? The children were paid in part for their interest by the conveyance or distribution of property in which Henry Beneke confessedly had a one-half interest, and in which the appellant had none. Thirteen hundred dollars of the money went to satisfy an existing mortgage, and the remainder went to satisfy the claims of the heirs *in part*. What proportion this sum bore to the entire amount received by the heirs is uncertain and incapable of ascertainment; and when we consider that the money was paid for the release of a disputed claim which was very doubtful at best, the uncertainty is still further increased. If the community advances money to compromise or procure the release of a disputed claim against the separate property of one of the spouses, in the nature of things this cannot convert the whole or any definite portion into community property. If the appellant has any claim, it is in the nature of a claim against the separate estate of Henry Beneke for moneys advanced by the community, such as she is prosecuting in the action instituted after the dismissal of the present action in the court below. In view of the conclusion we have reached on the merits, we express no opinion on the motion to dismiss the appeal.

There is no error in the record, and the judgment is affirmed.

HADLEY, C. J., CROW, FULLERTON, and MOUNT, JJ., concur.

[No. 6427. Decided September 18, 1907.]

William A. Libert, *Appellant*, v. Fred Unfried *et al.*, *Respondents.*[1]

Chattel Mortgages—Receivers. Under Bal. Code, § 5455, any person appointed by the court to take charge of mortgaged chattels during the pendency of foreclosure proceedings is a receiver.

Appeal—Appealable Orders—Vacation of Void Appointment of Receiver. An *ex parte* appointment of a receiver, without any notice of hearing or bond, is void and could only be temporarily valid until notice could be given; and an order vacating the appointment is not an appealable order, as the *ex parte* appointment could not be restored or continued by the appeal.

Same—Effect and Construction of Order. An order vacating, upon defendant's motion, a void *ex parte* appointment of a receiver, is not an appealable order in that it in effect denies plaintiff's motion for a receiver, submitted at the same time, where (1) plaintiff's motion only requested the confirmation of the *ex parte* order theretofore made, and (2) was not noted for hearing as required, and (3) the record shows that only the defendant's motion was considered and passed upon.

Appeal from an order of the superior court for Garfield county, Miller, J., entered May 12, 1906, in favor of the defendants, dissolving a temporary restraining order and vacating the appointment of a receiver. Appeal dismissed.

Charles L. McDonald, Ben F. Tweedy, and *Garrie W. Jewett,* for appellant.

I. N. Smith, J. L. Harn, and *Gose & Kuykendall,* for respondents.

Crow, J.—This action was commenced by W. A. Libert, plaintiff, as mortgagee, against Fred Unfried and Sylvia Unfried, his wife, mortgagors, to foreclose a chattel mortgage on a flock of sheep in Garfield county. The complaint, which

[1]Reported in 91 Pac. 774.

was filed and served April 17, 1906, alleged that the defendant Fred Unfried had, without the knowledge or consent of plaintiff, sold about two hundred and sixty head of the sheep; that unless restrained he would make further sales; that the defendants were insolvent, and that the plaintiff had, at his option, under the terms of the mortgage, elected to declare all the notes thereby secured to be due and payable. On April 19, 1906, the plaintiff made an oral *ex parte* application for the appointment of some suitable person to take possession of the mortgaged property and retain the same pending the foreclosure proceedings. The court forthwith entered an order directing one T. W. Owsley to take and care for the mortgaged property, and also restrained the defendants from selling or disposing of any of the sheep or their increase. This order was made without notice to, or the knowledge of, either of the defendants. It did not require Owsley to take an oath of office or give bond. It did not on its face purport to be a temporary emergency order, nor did it fix any time for the defendants to appear upon notice and show cause why a receiver should not be appointed or why a temporary restraining order should not be made. On April 30, 1906, the defendants moved the court to dissolve the *ex parte* restraining order, and to vacate the *ex parte* order appointing the receiver. After hearing this motion, the trial court, on April 11, 1906, made and entered an order (1) dissolving the temporary restraining order, and vacating the appointment of the receiver; and (2) restraining the defendants from selling or disposing of any of the mortgaged property, the latter to become effective upon the giving of a $500 bond by the plaintiff. From the order dissolving the *ex parte* injunction and vacating the *ex parte* appointment of the receiver, the plaintiff has appealed.

The respondents have moved this court to dismiss the appeal for several reasons. We will only consider their contention that the order upon which it is based is not appealable.

Subdivision 5 of Bal. Code, § 6500, as amended (Laws 1901, page 28) authorizes an appeal from an order appointing or removing, or refusing to appoint or remove, a receiver. The appellant, in the discussion of this case upon the merits, contends that Owsley was not a receiver, but that he was an agent or representative of appellant, appointed under Bal. Code, §§ 5877 and 5878 (P. C. §§ 6542, 6533). If this contention is correct, it would necessarily follow that the order is not appealable. In 1891 the legislature passed an act relating to receivers, Bal. Code § 5455 (P. C. § 574), reading as follows:

"A receiver is a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the court or officer may direct."

Under this statutory definition, any person appointed by the court to take charge of mortgaged chattels and retain the same pending foreclosure proceedings is a receiver, whether appointed under § 5456, or §§ 5877 and 5878, *supra*. If the appellant, upon notice to respondents, had moved for the appointment of a receiver, and the court after notice and hearing had refused to make such appointment, or if an appointment had been then made and the court had afterwards removed the receiver, there can be no question but that either of such orders would be appealable. The record discloses no such orders. The trial court, without notice and on appellant's *ex parte* application, appointed Owsley without requiring any bond or directing that the respondents should be notified to appear and show cause why a receiver should not be appointed. This order was void, as it in substance directed the receiver to seize and retain respondents' property without the giving of bond. But ignoring the fact that no bond was required, this court has held that the appointment of a receiver on an *ex parte* application without notice, can only be temporarily valid as an emergency order, until the defendants

can be notified to appear and show cause. *Larsen v. Winder*, 14 Wash. 109, 44 Pac. 123, 53 Am. St. 864, distinguished in *Cole v. Price*, 22 Wash. 18, 60 Pac. 153; *State ex rel. Washington Match Co. v. Superior Court*, 34 Wash. 123, 74 Pac. 1070.

In the last-mentioned case we said:

"The trial court seemed to be of the opinion that its temporary appointment of a receiver continued indefinitely, if no motion to discharge the same was made. This is not the rule. While the court may, on an *ex parte* application where an emergency is shown, appoint a receiver to take temporary charge of property until notice can be given and a hearing had on the question of the necessity for a receiver, such *ex parte* appointment has no force beyond such hearing, and a failure to make an order after such a hearing appointing a receiver, or continuing the first appointment, would operate to discharge the temporary receiver."

Had the emergency order appointing Owsley required him to take an oath of office and give bond, and had it further directed that upon notice the respondents should appear and show cause, it would nevertheless have become inoperative after such notice and hearing. If on such hearing the court afterwards determined the case to be one for a receiver, and appointed one pending the foreclosure, unquestionably the order making such appointment would be appealable. Should this court now entertain this appeal, it could not restore or continue the original, emergency, *ex parte* order of April 17, although that seems to be the substantial object and purpose of the appeal.

The appellant, however, contends that he filed a motion for the appointment of a receiver, which was heard with respondents' motion to dissolve and vacate, and that as the substance of the order made by the trial judge was to refuse a receiver on such hearing of appellant's motion, it is appealable. This contention cannot be sustained, for several reasons: (1) The appellant's motion did not ask for the appointment of a receiver; it only requested the court to confirm

the order theretofore made, and to continue appellant's possession under his mortgage, as theretofore ordered, so as to make the property available for the satisfaction of his debt, and prevent the losing of his security, relying upon Bal. Code, §§ 5877 and 5878. (2) Appellant's motion was never noted for hearing in the manner provided by statute; and (3) the record shows that the only motion considered and passed upon by the trial court was the one interposed by respondents.

Appellant contends that his appeal must be sustained under subdivision 6 of § 6500, *supra*. An examination of the order from which he has appealed shows such contention to be utterly devoid of merit.

The motion to dismiss is sustained.

HADLEY, C. J., RUDKIN, and MOUNT, JJ., concur.

[No. 6655. Decided September 18, 1907.]

WILLIAM A. LIBERT, *Appellant*, v. FRED UNFRIED *et al.*, *Respondents*.[1]

USURY—EXACTION OF BONUS—EVIDENCE—SUFFICIENCY. Where a note for $5,000 was given for money loaned and secured upon real estate and by chattel mortgage on a flock of sheep purchased by the borrower at the same time, the evidence sustains findings to the effect that another note for $1,000, given by the borrower at the same time, was a usurious exaction and bonus for the loan and without consideration, where the testimony of the lender was to the effect that, on the day the note was given, the parties entered into an oral partnership to buy certain sheep, and go into the business of raising sheep, that nothing was done thereunder but that in less than an hour he sold out his interest in the firm and anticipated profits for $1,000, for which the note in question was given, and immediately thereafter made the $5,000 loan with which the sheep were purchased; the borrower denying any such partnership and testifying that the $1,000 was a bonus demanded for the loan.

[1]Reported in 91 Pac. 776.

USURY—PENALTIES AND FORFEITURE—NOTE FOR BONUS AS ACCRUED INTEREST. Under the statutes limiting legal interest to twelve per cent, and providing that, in case of usury, the payee shall recover only the principal, less interest accrued, or less double the interest paid, the payee of a note for $5,000, with interest at 12 per cent, who exacted as a bonus for the loan another note for $1,000 with interest from maturity, has thereby contracted for usurious interest; and where suit was commenced on the $5,000 after maturity of the $1,000 note, the defendant is entitled to have credited on the note in suit the $1,000 note and all interest accrued thereon, as usurious interest exacted and accrued at the time suit was commenced; also double the amount of all interest paid, and the amount of all other interest accrued on the $5,000 note.

CHATTEL MORTGAGES—SHEEP—INCREASE. A chattel mortgage of "1,200 head of ewe sheep and their increase; 300 head of two-year-old wether sheep," does not include the clip of wool.

USURY—PENALTIES—COSTS—ATTORNEY'S FEES. Under the statute providing that in case of usury the defendant shall be entitled to costs, the plaintiff, upon being allowed recovery for principal, less penalties, is not entitled to attorney's fees or costs.

Appeal from a judgment of the superior court for Garfield county, Miller, J., entered August 29, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a chattel mortgage. Affirmed.

Charles L. McDonald, Ben F. Tweedy, and *Garrie W. Jewett,* for appellant.

I. N. Smith and *Gose & Kuykendall,* for respondents.

CROW, J.—This action was commenced by the plaintiff, William A. Libert, against the defendants, Fred Unfried and Sylvia Unfried, his wife, to foreclose a chattel mortgage. In the fall of 1905, the defendants were about to purchase a large flock of sheep from one Hamilton Gill, and the plaintiff loaned them $5,000 to pay the purchase price. To secure such loan, he took from the defendants three notes, dated October 23, 1905, one for $1,000 falling due June 15, 1906, one for $2,000 falling due June 15, 1907, and one for $2,000

falling due June 15, 1908, all bearing twelve per cent interest from date, and being secured by a mortgage on land in Garfield county and a chattel mortgage on the flock of sheep. About October 25, 1905, the defendant Fred Unfried executed and delivered to the plaintiff his additional unsecured note for $1,000, due March 15, 1906, with twelve per cent interest from maturity. The defendants claim this $1,000 note was required of them as a further exaction and extraordinary charge of interest for the use of the $5,000 loaned them by plaintiff. The plaintiff denies this, claiming that he sold to Fred Unfried a one-half interest in a partnership existing between himself and Unfried, and took the note as payment. The plaintiff alleged that the defendants had impaired his security by selling two hundred and sixty head of the sheep without his knowledge or consent, and that by reason thereof he had, at his option, declared the secured notes to be due and payable. Upon plaintiff's *ex parte* application the trial court, on April 19, 1906, appointed one Owsley receiver of the mortgaged sheep, and directed him to take immediate possession and hold the same pending the foreclosure proceedings. Upon motion of the defendants, this order was afterwards vacated, and from such interlocutory order of vacation the plaintiff prosecuted a preliminary appeal to this court, which we have dismissed on this date, in cause No. 6427, *ante* p. 182, 91 Pac. 774.

The record on this present appeal shows that, on the appeal from the interlocutory order, the plaintiff gave a supersedeas bond; that under such bond Owsley has continued in possession of the sheep, that he has clipped a large amount of wool; that he has turned the proceeds thereof into the custody of the clerk of the superior court; that the plaintiff claims a lien on this wool under his chattel mortgage, and that the defendants claim they are entitled to the wool or the proceeds of its sale, free from any lien. Upon trial the court made findings from which, with others, the following facts appear: That the defendant Fred Unfried had violated the

terms of the chattel mortgage by selling certain of the sheep without plaintiff's knowledge or consent; that $435.60, a portion of the proceeds of such sale, was paid to plaintiff on November 24, 1905, $50 being applied on account of interest and $385.60 on the principal of his notes; that the unsecured note for $1,000 dated October 25, 1905, executed by Fred Unfried, was without consideration except that it was given as an exaction of the plaintiff made upon the defendant Fred Unfried for the loan of $5,000, evidenced by the three secured notes, and that the chattel mortgage does not cover the clip of wool from the sheep. The court also stated the following conclusions of law:

"First: That the transaction set forth in plaintiff's complaint and in defendants' affirmative answer, arising out of the loan of defendants of the sum of five thousand ($5,000) dollars, and the exaction by plaintiff of the rate of interest specified in said notes, together with the further sum of one thousand ($1,000) dollars as a further and additional exaction for the use of said money, constitutes a usurious transaction and an unlawful charge for the loan of money by way of a premium which the plaintiff, William A. Libert, demanded and exacted of the defendant, Fred Unfried.

"Third: That by reason of the usurious nature of the loan and of the transaction set forth in this case, the plaintiff is not entitled to recover interest or attorney's fees or costs herein.

"Fourth: That defendants are entitled to the following credits on said five thousand dollar ($5,000) loan:

"(A) The sum of $1,000 as accrued usurious interest represented by the note.

"(B) The sum of $100 as being double the interest actually paid on November 24, 1905.

"(C) The sum of $385.60 as being payment on the principal of date of November 24, 1905.

"(D) The sum of $378.20 being the amount of unpaid accumulated interest on the $5,000 notes from November 24, 1905, to August 1, 1906, the date of decree.

"(E) The sum of $42 as being the amount of interest on the $1,000 note contracted for from date of maturity thereof (March 15, 1906) to August 1, 1906, date of decree.

"Fifth: That the plaintiff is entitled to recover judgment against the defendants, Fred Unfried and Sylvia Unfried, for the sum of three thousand, ninety-four and 20-100 ($3,094.20) dollars, without interest, attorney's fees or costs."

Upon these findings and conclusions, a final decree was entered, awarding plaintiff $3,094.20 debt, without attorney's fees or costs, and foreclosing the chattel mortgage upon the sheep, but not on the clip of wool. The plaintiff has appealed.

There is a motion to dismiss the appeal, because (1) the notice of appeal is insufficient, and (2) the certificate of the trial judge to the statement of facts is defective. We find no merit in either contention. The motion to dismiss is denied.

By his assignments of error the appellant contends that the trial court erred, (1) in finding that the $1,000 unsecured note was part of an usurious contract and without other consideration; (2) in deducting excessive amounts as penalty for the usurious contract, if it be held usurious; (3) in holding that the clip of wool was not subject to the chattel mortgage lien, and (4) in refusing to award appellant attorney's fees or any costs.

The unsecured note for $1,000 and the three secured notes for $5,000 were, as we find from the evidence, parts of the same transaction. The appellant claims that he and the respondent Fred Unfried entered into an oral contract to join in purchasing the sheep from Hamilton Gill; that the appellant was to advance the necessary funds to make the purchase; that the respondent Unfried was to care for the sheep, and that the two were to be partners in the sheep business. His evidence shows that the sheep were not jointly purchased; that he never paid any money on the alleged contract of partnership; that no papers were drawn, and that no partnership business was actually transacted. In fact, according to appellant's testimony, nothing was done except the making of the oral agreement. Appellant, however, contends that, within an hour or less time after the formation of the partnership,

the respondent Unfried purchased his interest in the firm and its anticipated profits for $1,000, giving his unsecured note in payment, and that immediately thereafter appellant made the $5,000 loan as an entirely separate transaction, thereby furnishing funds which enabled the respondent Fred Unfried to individually purchase the sheep from Hamilton Gill. The respondents contended, and Fred Unfried testified, that the appellant exacted the $1,000 note as a consideration or bonus for the $5,000 loan in addition to twelve per cent interest. The court found with the respondent on this issue, and we are satisfied with such finding, it being sustained by the evidence.

Pierce's Code, § 5701 (Bal. Code, § 3669), reads as follows:

"Any rate of interest not exceeding twelve (12) per centum per annum agreed to in writing by the parties to the contract, shall be legal, and no person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or thing in action than twelve (12) per centum per annum."

As the appellant's three secured notes by their terms call for this maximum rate of interest, he was contracting not only for twelve per cent on the $5,000 actually loaned, but also for $1,000 in addition thereto, as compensation for such loan, which made the contract usurious. Pierce's Code, § 5706 (3 Bal. Code § 3671), provides:

"If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void; but if in any action on such contract proof be made that greater rate of interest has been directly or indirectly contracted for or taken or reserved, the plaintiff shall only recover the principal, less the amount of interest accruing thereon at the rate contracted for, and the defendant shall recover costs; and if interest shall have been paid, judgment shall be for the principal less twice the amount of the interest paid, and less the amount of all accrued and unpaid interest."

Appellant's principal contention seems to be that the trial court should not have deducted the entire $1,000, the face of the unsecured note, as interest accruing on the $5,000 loan at the rate contracted for. He contends that the statute should be strictly construed as against the respondent; that only interest accrued at the date of judgment should be deducted, and that the $1,000 was not accrued interest. The trial court was right in its conclusion on this point. The $1,000 unsecured note by its terms had matured and, with $48 interest thereon, was due and payable at the time of the entry of final judgment herein. It had undoubtedly been given as compensation to appellant for the use of the $5,000, in addition to the maximum rate permitted by statute. Had it been paid by the respondents, appellant could not seriously contend that they would not be entitled to credit for twice the amount as interest paid. The evident purpose of § 3671, *supra*, was to compel the money lender who makes an usurious loan to credit his debtor with every dollar of accrued value which he has contracted to receive as compensation for the debtor's use of the money actually loaned. Under any fair interpretation, the $1,000 was past due interest, and being usurious interest was properly deducted from the appellant's claim. This is also true of the $378.20 additional interest which had matured on the $5,000 after the payment of November 24, 1905, and the $42 interest which had matured on the $1,000 note.

A proper construction of the chattel mortgage requires us to hold that it did not give appellant a lien on the clip of wool. The mortgage described "twelve hundred head of ewe sheep and their increase; three hundred head of two-year-old wether sheep." Appellant contends that the words "and their increase" applied to the yearly clip of wool. California has a statute reading as follows:

"Mortgages may be made upon the following personal property and none other: . . . Sixteenth. Neat cattle, horses, mules, swine, sheep, goats, and the increase thereof."

In *Alferitz v. Borwardt*, 126 Cal. 206, 58 Pac. 460, the supreme court held that the words "and the increase thereof," as applied to sheep in a chattel mortgage, did not include their wool, but their offspring only. *Stringfellow v. Sorrells*, 82 Tex. 277, 18 S. W. 689.

Considering the terms of appellant's mortgage, in the light of the evidence and all the surrounding circumstances, we construe the words "and their increase" to apply merely to the increase of lambs from the ewes. If it had meant wool, language definitely referring to the increase of wool from all the sheep would certainly have been used, and not language which excepted the wether sheep by referring only to the increase from the ewes. The evidence shows that at the time of the trial there had been an increase of about five hundred lambs, and the trial court properly held they were subject to the mortgage lien, and that the clip of wool was not.

The trial court did not err in refusing to allow appellant any attorney's fees or costs. The statute, Pierce's Code, § 5706, *supra*, provides that he shall recover only principal less certain deductions therein named, and that the defendant shall recover costs. If the appellant was only to recover a portion of his principal, he certainly was not entitled to recover any further sum, whether it be called attorney's fees or costs. We think the statute is not susceptible of any construction other than the one given it by the honorable trial court.

The judgment is affirmed.

Hadley, C. J., Rudkin, and Mount, JJ., concur.

[No. 6748. Decided September 26, 1907.]

JOHN BRANDT, *Appellant*, v. M. A. LITTLE, *Respondent*.[1]

JUDGMENT—VACATION—BY ACTION—MERITORIOUS DEFENSE. In an independent action in equity to vacate a judgment,, alleged to be void for want of jurisdictional process, it is necessary for the plaintiff to allege that he has or had a meritorious defense, or that the judgment was inequitable, the plaintiff not being a nonresident.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 27, 1907, upon sustaining a demurrer to the complaint, dismissing an action to vacate a judgment. Affirmed.

Fred H. Peterson and *H. C. Force*, for appellant.

J. H. Allen and *James A. Dougan*, for respondent.

ROOT, J.—This is an action in equity to vacate a judgment, upon the ground that in the original action no summons, complaint, nor any process of any kind was served upon this plaintiff, who was one of the defendants therein. A demurrer was sustained to the complaint, upon the ground that it did not allege that appellant had a defense upon the merits to the original suit. Appellant electing to stand upon his complaint, a judgment of dismissal was entered, and from this the present appeal is prosecuted.

It is urged by appellant that, in an action to set aside a judgment obtained without jurisdiction, no showing of merits is necessary, and reliance is placed upon the cases of *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123, and *Bennett v. Supreme Tent Maccabees*, 40 Wash. 431, 82 Pac. 744. In each of the cases cited, a motion was made in the original case to set aside the judgment, and the lack of jurisdiction appeared upon the face of the record. The general rule, however, seems to be that, in cases where an independent action is

[1]Reported in 91 Pac. 765.

brought in equity to set aside the judgment complained of—especially where the defect of jurisdiction does not appear upon the face of the record—it is necessary to make a showing that the party has, or at the time of the entering of the judgment complained of did have, a good and sufficient defense, in whole or in part, to the action, and that a different result would or should have been obtained had the complainant had an opportunity to defend in said action. In other words, the complainant, upon invoking the assistance of a court of equity, must show that the former judgment was inequitable. This would seem to be a wholesome and salutary rule. The time and the attention of the court ought not to be consumed in hearing a proceeding to set aside a former judgment unless such judgment has in reality prejudiced the rights of the party complaining. If it is not made to appear that any different result would or should have been reached had he been properly served, then he is not in a position to say that anything inequitable has been done him. It is possible that there may be exceptions to this rule, as in the case of a nonresident, or perhaps in a case where, had the defendant known of the judgment being taken against him, he could have paid, adjusted, or satisfied it more advantageously, although, as to these matters, we do not decide at this time.

As to the necessity for a showing of merits, we cite the following authorities: *Hill v. Lowman*, 15 Wash. 503, 46 Pac. 1042; *Dunklin v. Wilson*, 64 Ala. 162; *State v. Hill*, 50 Ark. 458; *Jeffery v. Fitch*, 46 Conn. 601; *Budd v. Gamble*, 13 Fla. 265; *Wiley v. Pratt*, 23 Ind. 628; *Garden City Wire Co. v. Kause*, 67 Ill. App. 108; *Gifford v. Morrison*, 37 Ohio St. 502, 41 Am. Rep. 537; *Gerrish v. Seaton*, 73 Iowa 15; *Piggott v. Addicks*, 3 G. Greene (Iowa) 427, 56 Am. Dec. 547; *Stokes v. Knarr*, 11 Wis. *389; *Harris v. Gwin*, 10 S. & M. (Miss.) 563; *Newman v. Taylor*, 69 Miss. 670; *Fowler v. Lee*, 10 Gill & John. (Md.) 358, 32 Am. Dec. 172; *Herbert v. Herbert*, 49 N. J. Eq. 70; *Gregory v. Ford*, 14 Cal. 139;

Bank v. Bray, 37 Mo. 194; *Kramer v. Gerlach*, 28 Misc. Rep. 525, 59 N. Y. Supp. 855; *Dawson v. Daniel*, Fed. Cas. No. 3668; Freeman, Judgments, § 498; 16 Am. & Eng. Ency. Law (2d ed.), 386, 387; 3 Pomeroy, Equity, § 1364 and note. See, also, *Northern Pac. etc. R. Co. v. Black*, 3 Wash. 327, 28 Pac. 538; *Western Security Co. v. Lafleur*, 17 Wash. 406, 49 Pac. 1061.

The judgment of the superior court is affirmed.

HADLEY, C. J., MOUNT, CROW, RUDKIN, and DUNBAR, JJ., concur.

[No. 6886. Decided September 28, 1907.]

WOODBRIDGE HODGE, *Respondent*, v. CHARLES HODGE, *as Administrator of the Estate of Watson Hodge, Deceased, et al., Appellant.*[1]

WORK AND LABOR—SERVICES BY MEMBER OF FAMILY—IMPLIED CONTRACT—EVIDENCE—SUFFICIENCY. Where one who came to visit his brother remained, and the two lived together on the brother's place doing together the work necessary to obtain a living, the law will not imply any contract to pay for the services, and where there is no evidence of any acts or conduct from which an inference to pay therefor could be drawn, a verdict for such services is unwarranted, and a nonsuit should have been granted.

APPEAL—PARTIES ENTITLED TO ALLEGE ERROR. Appellant cannot complain of a judgment reducing an excessive verdict, entered at appellant's request, and accepted by respondent in lieu of a new trial.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered November 26, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover for services performed under an alleged contract. Reversed.

Million, Houser & Shrauger, for appellant.

Smith & Brawley, for respondent.

[1]Reported in 91 Pac. 764.

MOUNT, J.—Respondent brought this action to recover upon a claim for services rendered to Watson Hodge, deceased, during his lifetime. The respondent in his complaint alleged that he performed labor and services for his brother during his lifetime between December 1, 1903, and December 1, 1904, three hundred and five days, at $1 per day, amounting to $305; that he cared for his brother during his last illness, one hundred and forty-three days, from December 1, 1904, to April 23, 1905, at $2 per day, amounting to $286; that a claim for these amounts was presented to the appellant as administrator, and rejected. The answer of the administrator denied that respondent had rendered any services to the deceased. Upon these issues the case was tried to a jury and a verdict was returned for the full amount claimed by the respondent. A motion for new trial was filed by the appellant. When this motion came on for hearing, the appellant offered to allow $50 on account of services rendered by respondent during the last sickness of Watson Hodge, and the court gave respondent the option of having a new trial granted or accepting $50 in lieu of the award of the jury of $286 for the services rendered during the last sickness of said deceased. The respondent accepted this offer and judgment was thereupon entered for $540 for services rendered prior, and $50 additional for care of said Watson Hodge, deceased, during his last sickness. This appeal is prosecuted from that judgment.

The only point made on this appeal is that the court erred in not sustaining appellant's motion for nonsuit at the close of plaintiff's evidence. The facts shown by the case are, in substance, as follows: The respondent, Woodbridge Hodge, and Watson Hodge, deceased, were brothers. The former at the time of the trial was seventy-two years of age. His brother at the time of his death was two years his senior. Watson Hodge died on April 23, 1905. About five or six years prior to Watson's death, respondent came to this state

to visit his brother Watson, whom he had not seen for about forty years, and who at that time was living with his wife on a little farm on Samish island, in Skagit county. Respondent thereupon made his home with Watson and his wife when he was not working for other persons. In November, 1903, Mrs. Watson Hodge died, and within a month thereafter respondent took up his permanent abode with his brother Watson, the two living together thereafter on Watson's place, doing their own cooking and housekeeping, performing such work as was to be done on the place, such as making garden, milking the cow, mowing the meadow of which there was one or two acres, and building a small fence, and taking care of a government light for which Watson Hodge was keeper at a monthly salary of $15. Upon the proceeds of all this work the two old men lived together. About the 1st of April, 1905, Watson Hodge became sick, and was thereafter confined to his bed until his death on April 23, 1905. During this time all the work and the care of Watson Hodge devolved upon respondent. Charles Hodge, the son of Watson, lived with his family near by his father, but they appeared to give little heed to the two old men. They visited Watson Hodge two or three times a few days previous to his death. This is the substance of the evidence in the case. There is no evidence of any contract of employment of respondent by his brother Watson Hodge, and there is no evidence of any acts or conduct of the parties or circumstances even tending to show that respondent was to receive any pay other than his living for his work.

In the case of *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352, we stated the rule in cases like this as follows:

"It is a rule universally recognized that, when the services are rendered by one who is a member of the family of the employer, the law will not imply a contract to pay for the services from the mere fact that they have been rendered upon the one hand and the benefits thereof received upon the other, as in the case of strangers. This is also held to be the rule

when there is no actual blood relationship existing between the parties, provided they sustain to each other the ordinary relations of members of the same family. It has been held, however, that when the family relationship exists it is not necessary to prove the terms of a direct and positive contract, but that proof may be made of words, acts and conduct of the parties, and circumstances from which the inference may follow that there was an understanding that the services were not to be rendered gratuitously; that when such is the case there is a contract upon which the value of the services can be recovered, and it is for the jury to say, from all the conduct of the parties and from the circumstances in evidence, whether there was in fact such an understanding or agreement."

See, also, *McBride v. McGinley*, 31 Wash. 573, 72 Pac. 105. It is clear in this case that respondent and his brother Watson were living together as members of the same family. There was no evidence to take the case to the jury upon the question of services rendered prior to Watson's death, under the rule above stated, and therefore the court erred in not dismissing the case as to that item.

The appellant cannot now complain of the judgment for $50, because that judgment was entered upon request of the appellant and was accepted by respondent in lieu of a new trial upon that item. For the reasons above given, the judgment of the trial court is reversed with directions to enter a judgment for respondent for $50 and costs of that court; appellant to recover the costs of this appeal.

HADLEY, C. J., FULLERTON, CROW, ROOT, DUNBAR, and RUDKIN, JJ., concur.

[No. 6691. Decided September 28, 1907.]

LAURA CLAIBORNE, *Respondent*, v. AUSTIN CLAIBORNE, *Appellant*.[1]

DIVORCE — ALIMONY — PROVISION FOR CHILD — GUARDIANS. Upon granting a divorce to the wife, who is awarded the custody of a minor child, the court may, although there is no property, give judgment for monthly alimony for the support of both wife and child, under Bal. Code, § 5723, authorizing the court to make "provision for the guardianship, custody, support," etc., of a minor child.

Appeal from an order of the superior court for King county, Tallman, J., entered November 19, 1906, upon findings in favor of the plaintiff, after a hearing on the merits, directing the payment of alimony awarded by a decree of divorce. Affirmed.

William H. Gorham, for appellant.

Blaine, Tucker & Hyland, for respondent.

MOUNT, J.—On November 14, 1901, the respondent, Laura Claiborne, was, at her suit, divorced by the superior court of King county, Washington, from the appellant. She was awarded the care and custody of a minor son. In the decree the court found, "that there is no community property or other property owned by either party to this action, requiring the interference of this court; . . . that the defendant is a very competent business man, and has heretofore been earning $250 per month, and is in good health; that $100 per month is a reasonable allowance for alimony for the plaintiff for the support of herself and younger son." Thereupon a decree was entered which provided, among other things, as follows: "That the defendant pay to the plaintiff the sum of $100 per month commencing on January 1, 1902, and a like amount on the 1st day of each and every month thereafter

[1]Reported in 91 Pac. 763.

for the support of herself and younger child, to continue in force until the further order of this court." Thereafter on November 13, 1906, the defendant in that action, having been served with an order to show cause why the allowance made by the decree as stated above had not been paid as provided in that decree, filed a motion to vacate so much of the original decree of divorce as awarded alimony for the support of his divorced wife, and on November 16, 1906, filed a motion to vacate the order to show cause why he had not complied with the decree. Both of these motions were based upon the ground that the court rendering the decree of divorce had no jurisdiction to require the husband to support his divorced wife and child, and that such order was therefore void. These motions upon the hearing were denied, and the court, after hearing the application upon its merits, directed the defendant to turn over a certain insurance policy to the plaintiff. This appeal is prosecuted from that order.

The only question presented here upon the merits is whether that portion of the decree of divorce awarding $100 per month to the wife for support of herself and minor child is void. In the case of *State ex rel. Brown v. Brown*, 31 Wash. 397, 72 Pac. 86, we affirmed a judgment enforcing a decree like the one in this case. It is true, the validity of the decree in that case was not discussed in the opinion or in the briefs of counsel. The validity of the original decree was apparently conceded. The statute, Bal. Code, at § 5723 (P. C. § 4637), provides that, "In granting a decree the court . . . shall make provision for the guardianship, custody, support, and education of the minor children of such marriage." This means that the court may appoint a guardian for minor children, and that such guardian may be remunerated by order of the court. If the statute makes no provision for the support of the divorced wife where there is no property and no children, it clearly makes provision for the support of minor children of divorced parties, and intends, at least, that where one

of them is fitted for the care of the minor children and is appointed to care for them, such party may be rewarded for such care as fairly as a stranger might be. It must follow that, in addition to the actual requirements for the child, provision by way of remuneration may be made for the guardian. This may have been the sole purpose of the decree in this case. Where there is no property but where there are minor children of divorced parties, we are satisfied that the statute is broad enough to authorize the court to decree to either party having the care and custody of such children sufficient support for both the child and the guardian.

The original judgment therefore was not void, and the order appealed from must be affirmed.

HADLEY, C. J., CROW, ROOT, DUNBAR, and RUDKIN, JJ., concur.

[No. 6698. Decided September 28, 1907.]

THE TOWN OF TEKOA, *Respondent*, v. JAMES E. REILLY, *Appellant*.[1]

APPEAL—DECISION—COURTS—STARE DECISIS. While courts are reluctant to overrule their decisions, this rule should not prevent the correction of an erroneous limitation on the taxing powers, where no rule of property is involved.

TAXATION—UNIFORMITY—STREET POLL TAX. Laws 1905, p. 140, authorizing cities of the third and fourth classes to impose and collect an annual street poll tax from male inhabitants over 21 years of age, does not, by reason of the exemption of females and minors, violate Const. art. 7, § 9, requiring uniformity in city taxes in respect to persons and property; since the constitutional requirement as to uniformity does not forbid a proper classification of the subjects of the tax (overruling *State v. Ide*, 35 Wash. 576, 77 Pac. 961).

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered July 13, 1906, upon findings in favor of the plaintiff, sustaining the validity of a street poll tax. Affirmed.

[1]Reported in 91 Pac. 769.

E. A. Williams, for appellant.

Canfield & Burson, for respondent.

RUDKIN, J.—This is an appeal from a judgment sustaining the validity of a street poll tax, imposed under Section 1 of the act of March 5, 1905, Laws 1905, page 140, by the town of Tekoa, a municipal corporation of the fourth class. The validity of the legislative act under which the tax was imposed is the principal question raised by the appeal, and the only question we deem it necessary to consider, as we find no merit in the other assignments of error. In *State v. Ide*, 35 Wash. 576, 77 Pac. 961, this court held that subdivision 7 of § 117 of the act of March 27, 1890, Laws 1890, page 183, was void, for lack of uniformity, under § 9 of article 7 of the state constitution. We here set forth the two sections and the constitutional provision invoked, so far as deemed material:

"The city council of such city shall have power . . . 7. To impose on and collect from every male inhabitant between the ages of twenty-one and fifty years an annual street poll tax not exceeding two dollars, and no other road poll tax shall be collected within the limits of such city: *Provided*, That any member of a volunteer fire company in such city shall be exempt from such tax." Laws 1890, page 183, § 117.

"The city council of cities of the third and fourth class in this state shall have power to impose on and collect from every male inhabitant of such city over the age of twenty-one years an annual street poll tax not exceeding two dollars, and no other road poll tax shall be collected within the limits of such city." Laws of 1905, page 140.

"For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." Constitution, article 7, § 9.

A comparison of the two sections will show that the former exempted four classes of persons, viz., females of all ages,

males under the age of twenty-one years, males over the age of fifty years, and volunteer firemen; while the latter exempts females and males under the age of twenty-one years only. There is nothing in the opinion in *State v. Ide* to indicate that the court deemed the exemption of females and males under the age of twenty-one years less obnoxious to the constitution than the exemption of males over the age of fifty years and volunteer firemen, and at the present time we see no plausible reason why the former section should be nullified and the latter upheld. We must therefore reverse the judgment in this case on the authority of *State v. Ide* or reconsider the question there decided. Courts are always reluctant to overrule their own solemn judgments and justly so.

"If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law." 1 Kent, Commentaries (14th ed.), p. 476.

"It will of course sometimes happen that a court will find a former decision so unfounded in law, so unreasonable in its deductions, or so mischievous in its consequences, as to feel compelled to disregard it. Before doing so, however, it will be well to consider whether the point involved is such as to have become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed

by any change; for in such a case it may be better that the correction of the error be left to the legislature, which can control its action so as to make it prospective only, and thus prevent unjust consequences." Cooley, Constitutional Limitations (7th ed.), p. 86.

We do not think, however, that a proper adherence to this wholesome rule forbids further inquiry in this case. No rule of property is involved, the legislature has reenacted the section nullified in *State v. Ide*, with slight modifications, and if this court has heretofore erroneously restricted the power of the legislature in the important matter of taxation we deem it our highest duty to correct the error at the first opportunity. The decision in the case hinges entirely upon the meaning of the phrase "Shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." Uniformity and equality in taxation are relative terms. "Perfect uniformity and perfect equality of taxation, in all the aspects the human mind can view it, is a baseless dream." Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798. "Perfectly equal taxation will remain an unattainable good as long as laws and government and man are imperfect." *Commonwealth v. People's etc. Savings Bank*, 5 Allen 428.

The people of this state in adopting a constitution did not hope to attain the unattainable. They did not propose to send the tax gatherer to the almshouse, the orphan asylum or the nursery, nor did they propose to lay a tax on the inmates of these institutions. In other words, they fully understood that if a street or road poll tax should be imposed, certain classes of persons would of necessity be exempt from the imposition. This much was conceded in the *Ide* case, for there the court said:

"It is conceded by counsel for appellant that the uniformity rule in taxation usually prescribed by law does not preclude the legislature from selecting and classifying in a proper and reasonable manner, the subjects of the tax, and that rule is

so firmly established that the citation of cases in support of it is entirely unnecessary."

If the legislature may select and classify the subjects of the tax in a reasonable and proper manner, how is a court to determine the reasonableness or appropriateness of the classification made? If up to the time of the adoption of the constitution, a street or road poll tax had never been imposed on a female or a minor in the Territory of Washington, or elsewhere (to our knowledge), would a reasonable and proper classification require their inclusion or exclusion? The constitution was not the beginning of law for this state. At the time of its adoption Washington was an organized territory with a code of laws for the government of its people. Section 2863 of the Code of 1881 provided as follows:

"Every male inhabitant of this territory over twenty-one and under fifty years of age, must be assessed and annually pay a poll tax of two dollars, except paupers, idiotic and insane persons, and all active firemen who have been a member of any fire company in this territory for the period of one year preceding the assessment of taxes;"

and nearly if not all the municipal charters granted by the territorial legislature authorized the imposition of a street poll tax with like exemptions. See, also, Seattle Charter, § 7, Laws 1885 and 1886, p. 241; Spokane Charter, § 8, Id., p. 302; Tacoma Charter, § 48, Subd. 2, Id., p. 196; Ellensburg Charter, chap. 2, § 5, Id., 397; Pomeroy Charter, chap. 2, § 7, Id., 326; Montesano Charter, chap. 2, § 8, Id., 353; Waitsburg Charter, chap. 2, § 8, Id., 275; North Yakima Charter, chap. 2, § 8, Id., 376.

By § 2 of article 27 of the Constitution, these laws and special charters were continued in force, unless repugnant to the constitution itself. Are all these charter provisions to be held for naught, simply because the constitution contains the general altruistic declaration that taxes shall be uniform with respect to persons and property? Had the framers of the constitution been dissatisfied with the existing order of things

would we not expect to find some more satisfactory evidence of their discontent? Instead of this, the first legislature to assemble under the constitution imposed an annual poll tax of two dollars on every male inhabitant of the state over twenty-one and under fifty years of age, except paupers, idiots, and insane persons (Laws 1890, page 553, § 64), and authorized municipalities to impose a street poll tax with like exemptions (Laws 1890, page 183, § 117, subd. 7). It was said in the *Ide* case that the custom of imposing such taxes since statehood could not legalize the usurpation of power. While this is true, yet when we consider that the custom during statehood is but the continuation of a custom running all through territorial days and sanctioned by territorial laws, a court should hesitate long before declaring it a usurpation of power. The decision in the *Ide* case seems to have been controlled largely by the decision in *Hunsaker v. Wright*, 30 Ill. 146, but that case involved a property tax and the question of classification or exemption under a poll tax law was not considered or decided. In *Town of Pleasant v. Kost*, 29 Ill. 490, the same court held that a statutory requisition upon male inhabitants between the ages of twenty-one and fifty years, except firemen, for two days labor for the repair of roads and streets, which might be commuted in money, was not in violation of the constitution of that state. True, the authority to impose the tax was found in the police power rather than in the taxing power of the state. Discussing the question of uniformity in *Commissioners of Ottawa County v. Nelson*, 19 Kansas 234, 27 Am. Rep. 101, the court said:

"Neither do we suppose that capitation taxes, or poll taxes, or requirements to work on the roads, or to train in the militia, come within said constitutional provision, although evidently they are all taxes in one sense."

In *City of Faribault v. Misener*, 20 Minn. 396, it was held that a poll tax imposed on qualified voters, except firemen, did not violate the constitutional requirement of equality in taxa-

tion. In the *Ide* case it was said that the Minnesota court was influenced largely by the long continued acquiescence of the people in the statute under which the tax in question was imposed; but while the long acquiescence of the people in the custom of levying such taxes was alluded to, yet a much more satisfactory reason for the decision can be found in the following extract from the opinion:

"While the latter clause of this section can only apply to taxes upon property, the former clause is broad enough in its terms to include any possible form of taxation, whether of persons or property, and to prohibit all exemptions whatsoever. Upon a strict construction of its language, a poll-tax upon qualified voters alone is as objectionable as a poll-tax on all qualified voters except firemen, for it is undoubtedly *possible* to levy and assess a poll-tax upon every inhabitant of the city, of whatsoever sex, age or occupation. The effect of such a construction, however, would be to prohibit taxation by the poll altogether; for there can be no doubt but that a poll-tax, thus levied and assessed, would justify the declaration of the bill of rights of the state of Ohio: 'That the levying taxes by the poll is grievous and oppressive; therefore the legislature shall never levy a poll-tax for county or state purposes.'

"No such prohibition as this is contained in the constitution of this state. The legislature has, therefore, the power to impose a poll-tax. The very language of the constitution implies that absolute equality is not to be expected. Taxes are to be "as nearly equal as may be"; not as nearly equal as a mathematical calculation can make them, but as nearly equal as is consistent with the general welfare of the people, and an equitable distribution of the public burdens. The constitution does not require a theoretical equality at the expense of substantial equity. . . . And in view of the grievous and oppressive results which would follow a levy and assessment upon the whole population of a certain sum per capita, a mode of taxation which, under the guise of equality, might, and probably would, be productive of intolerable hardship, it is clear that in the exercise of its right to levy poll taxes, the legislature must deviate to some extent from any such Procrustean standard of equality as this."

It must be apparent that a street poll tax imposed on minors or females, without regard to property or ability to pay, would be unjust and oppressive in the extreme. The burden of paying the tax for the entire household would ordinarily fall on the head of the family. Such a tax would lack both equality and uniformity and was never contemplated by the framers of the constitution. In *Thurston County v. Tenino Stone Quarries*, 44 Wash. 351, 87 Pac. 634, we held that the act of 1905, Laws 1905, page 297, imposing an annual road poll tax of two dollars on every male inhabitant of the state between the ages of twenty-one and fifty years, outside the limits of any incorporated city or town, did not violate any provision of our constitution. While the provision now invoked applies only to municipalities, yet a court should not readily presume that the constitution authorized or sanctioned one system of taxation within and another without the corporate limits of cities and towns. After a full consideration of the question presented, we are satisfied that the uniformity rule of taxation does not forbid a proper classification of the subjects of the tax, that the classification complained of is reasonable and proper, is sanctioned by usage, and violates no provision of the state constitution.

The judgment of the court below is therefore affirmed, and the case of the *State v. Ide, supra*, in so far as it conflicts with the views herein expressed, is overruled.

CROW, FULLERTON, and DUNBAR, JJ., concur.

MOUNT, J., dissents.

[No. 6415. Decided September 28, 1907.]

THE STATE OF WASHINGTON, *on the Relation of E. A. Shores et al., Plaintiff*, v. E. W. ROSS, *as Commissioner of Public Lands, Respondent.*[1]

PUBLIC LANDS—TIDE LANDS—SALES—APPLICATION—IMPROVEMENTS. Upon application for a sale of state tide lands, the applicant must advise the board of land commissioners of the true condition of the lands with respect to improvements, and it is no excuse that he claims the improvements thereon to be not of the character contemplated by the statute, or that he was not advised thereof.

SAME—COLLUSION AT SALE—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows collusion among bidders at a sale of state tide lands, warranting a refusal to deliver a deed therefor, where it appears that the applicant and two real estate speculators were the only bidders present at the sale, that after consultation among them, one of the speculators withdrew, and that three lots of the value of $2,000 were struck off for $87.50, one to the applicant and two to the other speculator, who immediately directed receipts to be made to the applicant, whose representative then signed an agreement to pay $500 for services, $200 of which was to go to one of the speculators and $300 to the other.

Application filed in the supreme court September 17, 1906, for a writ of mandate to compel the commissioner of public lands to deliver a deed to tide lands, after confirmation of sale. Writ denied.

Wm. H. Pratt and *Walter Loveday*, for relators.

The Attorney General and *A. J. Falknor, Assistant* (*E. M. Hayden*, of counsel), for respondent.

CROW, J.—This original proceeding, being an application for a writ of mandamus to compel the respondent to deliver to the relator, E. A. Shores, a deed for certain first-class tide lands, has heretofore been presented to this court, and in a written opinion in 44 Wash. 246, 87 Pac. 262, where a com-

[1]Reported in 91 Pac. 762.

plete statement may be found, it was directed that the superior court for Pierce county take evidence, make findings of fact, and certify the same to this court. In pursuance thereof, the cause came on for hearing in due course before the Honorable W. O. Chapman, judge of the superior court, and the evidence taken before him, together with his findings thereon, having been certified to this court, the entire cause is now before us for final disposition. The honorable superior judge found (1) that the relator E. A. Shores, in his application for a sale of the tide lands, made misrepresentations as to possession and improvements, and (2) that at the tide land sale there was collusion between the relator and other bidders. Having carefully examined all the evidence, we accept and approve these findings. On January 9, 1906, the relator made a written application to the board of state land commissioners for a public sale of the tide lands, in which he stated that the lands were not in the possession of any person, and that no improvements were situated thereon. The evidence shows that they were then occupied by the North Shore Lumber Company, in connection with its sawmill, such occupancy being so open and notorious that any person could have easily learned thereof had he so desired. The relator in his application also represented that no improvements were located on the tide lands, but the superior court found there were improvements of the value of $500.

The relator now contends that it was not necessary for him to mention in his application the improvements shown by the evidence, as they were not such as are contemplated by the statute. It is unnecessary for us to pass upon this contention. It was needful and proper that the board of land commissioners should be advised of the true condition of the lots by the written application, not only as to possession, but also as to existing improvements, whether such improvements came within the statutory requirement or not, and it was the relator's duty to fully state all the facts in that regard. He

now contends that he did not have actual knowledge of the exact condition of the lands as to possession or improvements, and that he has not been guilty of wilful misrepresentation. Accepting this statement as true, he was then in no position to prepare and present a proper application to the board of state land commissioners, but should have deferred making his application until he could first examine the property and become fully advised as to the situation.

The finding that collusion existed between the relator and other bidders at the sale of June 30, 1906, is clearly sustained. The collusion shown was of such a character that, under our former opinion, we are now compelled to deny the writ, without regard to the misrepresentations as to possession or improvements. The evidence shows, that the relator was represented at the sale by his son, E. Arthur Shores, and his son-in-law, one Eldridge; that one Lay and one Haller, real estate speculators, were present; that Lay had called upon E. Arthur Shores the day previous, and advised him of his intention to bid; that at the sale a consultation took place between Shores, Eldridge, Haller, and Lay; that Haller withdrew, after stating that he would be satisfied with whatever Mr. Lay might do; that Eldridge, being the only bidder therefor, purchased lot 1; that Lay purchased lot 2 after slight competitive bidding; that he also purchased lot 3, being the only bidder therefor; that the total purchase price for all three lots was $87.52; that as shown by the evidence of disinterested expert witnesses the three lots were, on the day of sale, worth at least $2,000, market value; that a few minutes after the sale, Eldridge and Lay directed the county auditor to make receipts for the entire purchase price to the relator, and that E. Arthur Shores thereupon executed and delivered to Lay an instrument reading as follows:

"Tacoma, Wn., June 30, 1906.

"For services rendered and lots delivered after deeds are obtained, I hereby agree to pay L. D. Lay five hundred dollars.

E. A. Shores."

The evidence fails to accurately declare what services were rendered by Lay to Shores. Lay and Haller had an agreement by which the one was to receive $200 and the other $300 of this sum. All the parties above mentioned deny any consultation at the sale or collusion in the matter of bids, but the purchase of the property at an exceedingly low figure and the $500 bonus to Lay, agreed upon immediately thereafter, are utterly unexplained, as likewise are other suspicious circumstances disclosed by the evidence. Applying the law of this case, as settled by our former opinion, to the evidence and facts now before us, we cannot award the relator any relief.

The writ is denied.

HADLEY, C. J., MOUNT, ROOT, and DUNBAR, JJ., concur.

[No. 6711. Decided September 28, 1907.]

J. H. WEES, *Respondent*, v. A. J. PAGE, *Appellant*.[1]

APPEAL — REVIEW — QUESTIONS CONSIDERED — WAIVER OF ERROR. Where defendant introduces evidence after denial of a motion for nonsuit, and makes motion for judgment on appeal, the supreme court will only consider the motion for judgment.

ESTOPPEL—INCONSISTENT POSITION IN OTHER ACTION—PRINCIPAL AND AGENT—EXISTENCE OF RELATION. Where, in an action to foreclose a mortgage, prosecuted by P. as agent for the plaintiff, P. testified and established that certain wheat, delivered to P. by defendant and pleaded by defendant as a payment, was not received by P. as agent for the mortgagee, and the court entered judgment without allowing any credit for the wheat, in an action against P. for conversion of the wheat, P. is estopped from claiming that he received the wheat as agent of the mortgagee and that the same was credited on the note in the foreclosure suit.

PRINCIPAL AND AGENT—AUTHORITY—POWER OF ATTORNEY. A power of attorney authorizing an agent to collect monies, does not empower him to receive wheat as a payment on the principal's note.

[1]Reported in 91 Pac. 766.

PLEADING—VARIANCE—ISSUES AND PROOF. An indefinite memorandum of a settlement between parties, making no reference to a wheat transaction in controversy, is inadmissible to show a settlement when none was pleaded.

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. The rejection of an immaterial exhibit is harmless error where it in no way corroborated the witness and practically the same evidence, offered by the adverse party, was excluded on objection by the appellant.

Appeal from a judgment of the superior court for Spokane county, Yakey, J., entered November 22, 1906, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits in an action for conversion. Affirmed.

Merritt, Oswald & Merritt, for appellant.

Warren W. Tolman, for respondent.

CROW, J.—This action was commenced in July, 1904, by the plaintiff, J. H. Wees, to recover from the defendant, A. J. Page, the value of certain wheat. From a judgment in favor of the plaintiff, the defendant has appealed.

The appellant contends that the trial court erred in denying his several motions for a nonsuit and for judgment at the close of all the evidence. As appellant did not rest his case upon his motion for a nonsuit, but introduced evidence in defense, we can only consider his motion for judgment. *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982; *Gardner v. Porter*, 45 Wash. 158, 88 Pac. 121.

It appears, that on September 1, 1895, the respondent, J. H. Wees, and Mary L. Wees, his wife, executed and delivered to one S. S. Page their note for $1,750, secured by mortgage on real estate in Spokane county; that S. S. Page, who was a nonresident of Washington, was, in making the loan, represented by appellant, A. J. Page; that in the fall of 1897 the respondent delivered to appellant a large amount of wheat, with the understanding and agreement that he was to sell the same and apply the proceeds on the S. S. Page note; that in 1901, S. S. Page, acting through A. J. Page, commenced

a foreclosure action on the mortgage; that Wees and wife alleged payment, which allegation was denied; that judgment was entered, without findings of fact, in favor of S. S. Page; that Wees was allowed no credit on account of the wheat; that during the trial of the foreclosure action, Wees for the first time discovered that appellant had not applied the proceeds of the wheat in payment on the note, and that he thereafter commenced this action to recover its value. The amended complaint included three causes of action, which were identical except as to amounts and dates. In the first cause of action the respondent alleged:

"That on the 9th day of September, 1897, the said plaintiff was indebted to S. S. Page in the sum of more than fifteen hundred dollars, which sum of money was then due and owing from said plaintiff to said S. S. Page; that on and prior to said day the said defendant, with the intent to swindle, cheat and defraud said plaintiff, falsely and fraudulently represented and said to said plaintiff that he, the said defendant, was then and there the agent of the said S. S. Page for the hereinafter specified purpose, and was then and there authorized by the said S. S. Page, as such agent, to receive, for and on account of the said S. S. Page, from the said plaintiff, the hereinafter mentioned wheat, to sell the same and apply and pay the money arising from such sale as a credit upon said debt; that thereafter and on or about the 9th day of September, 1897, the said plaintiff, believing said representation and statement to be true, and relying thereon, and being moved and induced thereby, and having inquired as to whether the said defendant A. J. Page was then and there the agent of said S. S. Page for the hereinafter specified purpose, and upon such inquiry said plaintiff having been informed that said defendant A. J. Page was then and there such agent, said plaintiff did deliver to said defendant, as said agent, and for the purpose aforesaid, seven hundred and ninety bushels of wheat, which said defendant then and there received and then and there undertook, promised and agreed to and with the said plaintiff to sell the same, and to apply and pay the money received therefor in part payment of said debt."

Respondent further alleged, that the appellant had sold the wheat; that he had refused to pay the proceeds to S. S. Page;

that he had converted the same to his own use; that appellant then and there knew he was not the agent of S. S. Page for any such purpose; that respondent had made demand for the value of the wheat, and that he did not discover the failure of appellant to pay the proceeds to S. S. Page until August 1, 1901.

The appellant admitted that the respondent was indebted to S. S. Page, but denied all other allegations of the amended complaint. For his sole affirmative defense he pleaded the foreclosure action; alleged that he, A. J. Page, had conducted that suit as agent for S. S. Page; that by the final decree each and all of the matters and things in controversy herein were finally litigated and determined between the respondent and appellant, and that respondent received credit therein for the value of the wheat. The appellant contends that this present action is one for *tort* based on deceit; that the alleged deceit, according to the averments of the amended complaint, consisted in appellant's false and fraudulent representation that he was the agent of S. S. Page, while knowing he was not such agent; that there has been a failure to sustain these allegations, as the evidence shows appellant was such agent; that respondent so testified; that appellant's power of attorney which is in evidence, so shows; that the wheat is shown to have been delivered to, and received by, appellant as such agent; that there was no deceit or falsehood as to such agency; that the wheat having been delivered to him in his capacity as agent, he was not personally liable therefor, and that the motion for judgment should have been sustained.

Appellant is in no position to make any such contention, being estopped by his own conduct from now claiming that he was the agent of S. S. Page to receive the wheat. His answer alleges that respondent received credit for the wheat in the foreclosure suit. The pleadings in that action, which are in evidence, make no mention of the wheat, although payment was pleaded. No findings were filed, but the judge

who tried the foreclosure action testified in this cause that he allowed no credit to Wees and wife on account of the wheat. Sufficient facts appear to indicate that A. J. Page, who prosecuted the foreclosure suit as agent for S. S. Page, then contended that he did not receive the wheat as agent for S. S. Page, but in his own behalf. In any event, the facts stand undisputed that appellant did actually receive the wheat, and that respondent received no credit therefor in the foreclosure action.

In his answer herein appellant alleges that he conducted the foreclosure suit. He was a witness in that action, and by his evidence must have convinced the trial court that he did not receive the wheat as agent for S. S. Page. If his evidence had not tended to show that he received it in some other capacity, the trial judge would have allowed a credit therefor to respondent, who not only pleaded payment, but relied upon the wheat deal to show such payment. Appellant, by his evidence and conduct of that trial, succeeded in defeating respondent's defense of payment, the issue there tried, and it being conceded that appellant did receive the wheat, it must have necessarily appeared he received it in some other capacity than as agent for S. S. Page. That being true, he should now be estopped from disputing the respondent's present contention that he was not such agent in receiving the wheat. If appellant held any individual claims against the respondent, to the payment of which he applied the wheat, he should have pleaded them in this action. He has not done so, and we must therefore assume that no such claims existed. He did not offer himself as a witness in this action, nor has he here attempted to explain the wheat transaction. He has elected to remain quiet on that subject. His reasons for this method of procedure he has not seen fit to disclose. He now relies upon the foreclosure proceedings pleaded by him as a former adjudication. The record in that case, as explained by the evidence of the judge who entered the decree, indisputably shows

that respondent was there held not entitled to any credit on the note for the wheat. By this holding, it was necessarily and conclusively adjudicated that appellant was not agent of S. S. Page for the purpose of receiving the wheat. Should it be to the interest of the respondent to contend in subsequent litigation that appellant was agent of S. S. Page in the wheat deal, such former adjudication would preclude him from so doing. Yet appellant is now endeavoring to defeat the respondent in this action by predicating his entire defense upon the existence of the identical agency which he disproved in the foreclosure. Such a defense would be inequitable, unconscionable, a travesty on justice, and should not be permitted by any court. It would deliver respondent's wheat to appellant without requiring him to account for the same at any time or in any manner.

But aside from any question of estoppel, the best evidence of the agency upon which appellant now relies is the power of attorney. It is in evidence, and reads as follows:

"I hereby constitute A. J. Page of Cheney, state of Washington, my true and lawful attorney in fact, authorizing him as such attorney to collect all monies owing to me in the state of Washington, whether now due or to become due. . . ."

This language authorized appellant to collect money due on the note, but it did not authorize him to receive anything in payment except money. He had no authority to accept wheat. It is an elementary principle in the law of agency that power in an agent to receive payment authorizes its receipt in money only; that being the only way in which he can fully discharge his duty to his principal. Story, Agency (9th ed.), §§ 98, 181; *Carver v. Carver*, 53 Ind. 241; *Pitkin v. Harris*, 69 Mich. 133, 37 N. W. 61; *Robson v. Watts' Heirs*, 11 Tex. 764; *Stetson v. Briggs*, 114 Cal. 511, 46 Pac. 603; *Scully v. Dodge*, 40 Kan. 395, 19 Pac. 807; *St. John & Marsh Co. v. Cornwell*, 52 Kan. 712, 35 Pac. 785.

The complaint, in substance, alleges, that A. J. Page falsely and fraudulently represented to respondent that he

was authorized as agent of S. S. Page *to receive the wheat.* The evidence does not show any such authority. The representation was therefore fraudulent as alleged. Of course, if appellant received the wheat and, after selling, actually paid the proceeds on the note, his principal, by accepting the money, would have ratified his unauthorized acts, and would have been bound. But appellant did not do so. The mere delivery of the wheat to appellant was not binding on S. S. Page, as payment on the note. The amended complaint further alleged that appellant undertook, promised, and agreed with respondent, to sell the wheat and apply the proceeds; that he did make the sale, but that he did not apply the proceeds as agreed. There has certainly been no failure to prove this allegation. It is, in fact, undisputed that appellant did receive the wheat; that he sold it, and that he did not apply the proceeds as payment on the note. The motion for judgment was properly denied.

Appellant also contends that the trial court erred in sustaining respondent's objection to his offer of a writing which has been marked "Defendant's Exhibit A for identification." He contends that it was offered for the purpose of showing that respondent had learned, as early as October 11, 1898, that appellant had not applied the proceeds of the wheat as a payment on the note, and that it tended to sustain appellant's plea of the statute of limitations. The exhibit seems to have been an indefinite memorandum of some kind of settlement between the parties, making no mention of any wheat. It was not competent evidence to show any settlement, none having been pleaded, and appellant concedes that it was not admissible for any such purpose. We fail to see how it tends to show knowledge of appellant's use of the wheat on the part of the respondent. There is nothing on its face or expressed in its terms that suggests any wheat item. The party who drew the exhibit was permitted to testify that the respondent did, at its date in October, 1898, talk over the wheat, and

then fully understood all that had been done. This evidence being admitted, we cannot understand how the appellant was prejudiced by the rejection of the exhibit, which in no way tended to corroborate the witness. In any event the respondent afterwards offered another writing, prepared at the same time by the same witness, containing the identical item upon which appellant relied, but not purporting to be any settlement. On appellant's objection this offer was rejected. It would seem from this that appellant's real purpose in offering exhibit A was to confuse the jury by suggesting some sort of a settlement not pleaded. Had he only desired to call attention to the item he claims referred to wheat, he could have done so by consenting to the offer made by respondent. In this condition of the record he waived any alleged error of the trial court in refusing to admit exhibit A, and is therefore in no position to complain.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, ROOT, DUNBAR, and RUDKIN, JJ., concur.

[No. 6721. Decided September 28, 1907.]

JACOB ANDREWS, *Respondent*, v. JOSEPH HOESLICH, *Appellant*, UNCLE JOE DIAMOND BROKER, *Defendant*.[1]

REPLEVIN—DEFENSES—POSSESSION OF DEFENDANT. The rule that replevin does not lie against one not in possession of the property, does not obtain where the defendant had been in possession and wrongfully disposed of the property prior to the commencement of the action, without the knowledge of the plaintiff at the time.

SAME—TENDER—KEEPING GOOD. If, in an action of replevin for property pawned, plaintiff is obliged to keep good his tender of the sum received on the pledge, it is sufficient if the money was paid into court and remained there before service of summons upon defendant, although not paid, as alleged, with the filing of the complaint.

[1]Reported in 91 Pac. 772.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 19, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of replevin. Affirmed.

John E. Humphries and *George B. Cole*, for appellant.

Jay C. Allen, for respondent.

Crow, J.—This action, which was brought by Jacob Andrews against Joseph Hoeslich and the Uncle Joe Diamond Broker, a corporation, to recover possession of a diamond ring, has heretofore been before this court on an appeal prosecuted by the defendant corporation, and a statement of the pleadings and the facts involved may be found in the opinion then filed. *Andrews v. Uncle Joe Diamond Broker*, 44 Wash. 668, 87 Pac. 947. At the former trial the defendant, Joseph Hoeslich, was not in court. He was served afterwards, and on July 28, 1906, served his answer, in which, after denying allegations of the complaint, he affirmatively pleaded, that on August 27, 1904, the plaintiff left the ring with him as a pawn to secure a loan of $50; that he issued a pawn ticket to the plaintiff; that thereafter the plaintiff sold and delivered the pawn ticket to him for the sum of $5 in addition to the $50 loan, and that the plaintiff then ceased to have any further interest in the ring. This affirmative answer being denied, the cause was tried on the issues thus joined between the plaintiff and the defendant Joseph Hoeslich. The trial court made substantially the same findings as those made on the former trial, sustaining all the allegations of the complaint, and further found that, within a week or so after the ring had been pawned, the defendant Joseph Hoeslich sold it without the knowledge or consent of the plaintiff, that in this action the plaintiff tendered to the defendant, and paid into court for his use and benefit, the sum of $75, which has ever since remained in the registry of the court, and that the ring was of the reasonable value of $216. Upon these

findings a final judgment was entered in favor of the plaintiff for the return of the ring, or in case a return could not be had, for the sum of $141, being its value less the $75 in the registry of the court. The judgment further provided that, if the ring should be returned, the $75 in the registry of the court should be paid to the defendant; but that otherwise the plaintiff was not only to have judgment for $141, but the $75 should also be returned to him. The defendant has appealed.

The appellant's first assignment of error is based upon his exceptions to the findings of fact. We have carefully examined the evidence and conclude that the findings are supported by its preponderance. The appellant raises the same question based upon the statute of frauds that was urged by the defendant corporation on the former appeal, but we now adhere to our views then expressed.

The appellant further contends that, as he was not in possession of the ring at the time of the commencement of this action of replevin, the respondent cannot recover. The common law rule undoubtedly is that an action of replevin cannot be maintained against a defendant who is not in possession at the time the demand is made or the suit is commenced. This doctrine was announced in *Dow v. Dempsey*, 21 Wash. 86. 57 Pac. 355. In that case, however, it affirmatively appeared that the plaintiff instituted her action after she had learned and positively knew that the defendant, as sheriff of Spokane county, had parted with the goods, by delivering them to a receiver, in obedience to an order of court. Here the court did not find, nor is it suggested by the evidence, that the respondent knew at any time prior to the commencement of the action that the appellant had sold the ring or parted with its possession. Under such circumstances an exception must be recognized to the rule in *Dow v. Dempsey, supra.*

Where, as in this case, property has actually been in appellant's possession and has been wrongfully transferred by

him without respondent's knowledge, before the commencement of an action for the recovery of its possession, the rule that replevin will not lie against one not in possession at the time of the commencement of the action will not obtain. The evidence and findings show that the appellant's disposition or sale of the ring was wrongful. In an action for the recovery of the possession of personal property, when it appears for the first time during the progress of the trial that the defendant theretofore in possession had, prior to the commencement of the action, without the knowledge or consent of the plaintiff, wrongfully disposed of the property, it would be a rank injustice for any court to hold that the plaintiff cannot for that reason recover. Many well-considered cases hold that the action does not fail under such circumstances. Wells, Replevin (2d ed.), § 145; *McBrian v. Morrison*, 55 Mich. 351, 21 N. W. 368; *Gildas v. Crosby*, 61 Mich. 413, 28 N. W. 153; *Helman v. Withers*, 3 Ind. App. 532, 30 N. E. 5; *Holliday v. Poston*, 60 S. C. 103, 38 S. E. 449; *Latimer v. Wheeler*, 3 Abb. App. 35; *Ellis v. Lersner*, 48 Barb. 539; *Ross v. Cassidy*, 27 How. Pr. 416; *Brockway v. Burnap*, 16 Barb. 309; *Nichols v. Michael*, 23 N. Y. 264; *Harkey v. Tillman*, 40 Ark. 551.

In the last mentioned case the supreme court of Arkansas said:

"Actual possession of the property by defendant is not always essential, at the time of the writ. That would be a very inconvenient rule, which would enable one who had wrongfully taken or detained property from the owner to refuse to deliver and hold to the last moment before the writ, and then evade a suit by a transfer of possession. His successor might do the same; and his after him; and so on *toties quoties*, until the costs of writs to the owner would consume the property. When one is wrongfully detaining property and refuses it on demand, he is liable to the action, although it may not remain in his possession when suit is brought."

In *Sinnott v. Feiock*, 165 N. Y. 444, 59 N. E. 265, the court of appeals, in a well-considered case, held that a defendant is

not liable in an action of replevin for the recovery of chattels, after they had been taken from him by process legal as to him, and not by any voluntary act on his part; but in its opinion, in which many of the earlier cases are considered and reviewed, it clearly recognizes the doctrine announced in *Nichols v. Michael*, 23 N. Y. 264, and other cases above cited. In this state an action to recover the possession of personal property may be prosecuted without claiming delivery until after final judgment on the merits. In such a case the reason for the common law rule forbidding the prosecution of an action of replevin against one not in possession fails, and we see no reason why an alternative judgment for the possession of the property or the recovery of its value may not be obtained, although the evidence establishes the fact that the defendant was not in possession at the commencement of the action, or at any time thereafter, provided it further appears that the defendant had theretofore been in possession, had voluntarily, wrongfully, and fraudulently parted with such possession, and that the plaintiff did not know before commencing action that the defendant had so parted with possession. The appellant, who wrongfully disposed of the ring without the knowledge or consent of the respondent, who failed to advise the respondent of such disposition prior to the commencement of this action, and who concealed his wrongful acts from the respondent at all times prior to the trial, is now in no position to contend that judgment shall be entered against the respondent, because the evidence fails to show that he, the appellant, had possession of the ring at the commencement of the action.

The appellant further contends that the respondent did not keep his tender good. The complaint was filed on January 27, 1906, but the respondent did not deposit the $75 in the registry of the court until March 21, 1906, and the appellant now insists that the tender was not kept good as the money was not deposited when the complaint was filed. Under the

facts before us, there is no merit in this contention. Although the respondent made a tender prior to the commencement of this action, he has proceeded upon the theory that it was necessary for him to thereafter keep such tender good. In his complaint he not only alleged the tender made when he demanded possession of the ring, but further alleged, "That the plaintiff has offered, as hereinbefore alleged, does now offer and tender to pay the sum of seventy-five dollars ($75) in discharge of said pledge aforesaid, and does now tender and pay into court the sum of seventy-five dollars ($75) the amount thereof." This allegation was denied by the answer, and in our opinion on the appeal of the defendant corporation, we found that it was not sustained by the evidence. Proceeding upon the theory of the respondent, we then said:

"Respondent's right to maintain the suit, and obtain the judgment, depended upon whether he had tendered the $75, and had at all times kept the tender good. Appellant argues, with apparent seriousness, that the judgment is against it for the return of the ring or its value, and that respondent retains the $75. Such a result would be manifestly wrong, and the condition of the record is such that we cannot tell whether the tender has been kept good so that it has at all times been available to appellant or not." *Andrews v. Uncle Joe Diamond Broker*, 44 Wash. 668, 87 Pac. 947.

Notwithstanding this language, we do not wish to be understood as holding that, under the facts of this case, the respondent was under any legal obligation to bring the tender into court with the filing of his complaint, and keep it there at all times until final judgment. It may be seriously questioned whether appellant's lien on the ring was not discharged by the tender made prior to the suit. Jones on Pledges and Collateral Securities (2d ed.), § 542; *Helphrey v. Strobach*, 13 Wash. 128, 42 Pac. 537. If his lien was then discharged it might be further questioned whether it would have been necessary for the respondent to keep his tender good at the time of filing his complaint, and at all times there-

after. *Weeks v. Baker*, 152 Mass. 20, 24 N. E. 905; *Hyams v. Bamberger*, 10 Utah 3, 36 Pac. 202. The respondent, however, assumed by the allegations of his complaint that he should keep the tender good. In other words, he did not plead or rely upon any claim that the lien had been discharged, but prosecuted this action upon the theory that to discharge the lien he must continue his offer to keep the tender good as a condition precedent to the recovery of the possession of the ring.

On the former appeal a reversal was granted because it neither appeared that the $75 remained in the registry of the court at the time of final judgment, nor that the final judgment protected the appellant corporation in all of its rights. The record here shows beyond question that before service of summons was made upon the present appellant, Joseph Hoeslich, the $75 tender was deposited in the registry of the court, that it has since remained there, and that the trial court has in the final judgment fully protected the appellant. This being true, he is now in no position to complain of the respondent's failure to deposit the $75 at the time he filed his complaint. The evidence now before us establishes the fact that the respondent has fully complied with every reasonable requirement that could be made of him in the matter of tender.

The judgment is affirmed.

HADLEY, C. J., ROOT, FULLERTON, MOUNT, DUNBAR, and RUDKIN, JJ., concur.

[No. 6720. Decided September 28, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. THOMAS C. JOHNSON, *Appellant*.[1]

APPEAL—ASSIGNMENT OF ERRORS. A general assignment of error as to the admission of evidence is insufficient, where no reference is made to any particular evidence and no argument made thereon.

TRIAL—INSTRUCTIONS—REQUESTS. Requested instructions are properly refused, if faulty, inapplicable, or covered by the general charge.

HOMICIDE—MANSLAUGHTER—SELF-DEFENSE—JUSTIFICATION FOR USE OF WEAPON—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a conviction for manslaughter, where it appears from the testimony of the defendant that he was attacked by the deceased, who was unarmed and a much smaller man than himself, that he might have avoided the attack after the altercation commenced by shutting a door and keeping deceased out of his room, which he failed to do, but admitted him to the room, and in the encounter that ensued used an open knife upon the deceased, stabbing him while pushing him out of the room; whether defendant was justified in using a knife being a question for the jury.

Appeal from a judgment of the superior court for Spokane county, Gilliam, J., entered September 21, 1906, upon a trial and conviction of manslaughter. Affirmed.

A. C. Shaw, for appellant.

Richard M. Barnhart, Fred C. Pugh, and *A. J. Laughon*, for respondent.

ROOT, J.—On the night of June 7, 1906, in his room at the Rainier hotel, in Spokane, the defendant stabbed one Tuttle with a knife, inflicting injuries from which the latter died a few days thereafter. Defendant was tried upon an information charging murder in the second degree, and convicted of manslaughter. From a judgment and sentence thereupon, he appeals to this court.

[1]Reported in 91 Pac. 949.

There appears to have been no witness to the altercation between defendant and decedent, other than the parties themselves. No statement of the decedent was used upon the trial. The defendant's account of the occurrence is about as follows: He says that he had gone to bed early, suffering from neuralgia; that on four occasions he had been aroused from his sleep by the noise of people walking or talking in the hall of the hotel; that about 11:30, having been awakened by the voices of a man and woman laughing and talking in the hallway, and believing the woman to be a chambermaid named "Lizzie," he went to the door of his room with the intention of calling to her to stop the noise in the hallway, and also with the idea of requesting her to go to her mother's room and bring some liniment such as he had theretofore used. Upon reaching the door, he looked in the hallway but could not see the chambermaid or any other woman, but saw the decedent standing some distance away near the stairway, and apparently looking toward some one on the stairs or in the hallway below. This was upon the fourth floor of the hotel. He said he asked the decedent: "Where is Lizzie?" and that decedent, with an oath, asked him what he wanted of Lizzie, to which he replied: "I want to see her to tell her not to make so much noise, or stop the noise that was being made in the hall." To this the decedent answered: "If you have any kick coming, go jump on Lizzie, not on me"; to which defendant says he replied: "My dear sir, you need not get hot about it"; that thereupon the decedent said, with a vile oath: "I will fix you," and that he then came over where defendant was and struck him in the face, and followed it up by repeatedly striking and beating him; that defendant withdrew into the room to get a chair with which to defend himself; that he was then in his nightclothes; that he procured from the pocket of his pants, which were lying on the chair, a knife which he opened and used against the decedent to drive him away; that he followed the decedent to the door,

pushing him with one hand and striking him with his knife in the other, and in this manner ejected him from the room; that he was angry but did not intend to kill decedent.

There was some evidence that decedent had been drinking, although no showing as to what extent, and it appeared that he was inclined to be cross and irritable when under the influence of liquor. The cross-examination and the statements theretofore made by defendant upon the preliminary examination tended to show that the defendant was irritated and angry, either by being disturbed or at the attentions being paid by the decedent to the chambermaid, or by both; that defendant could have shut the door and kept the decedent from coming in; that the latter was a much smaller man physically than the defendant, and was entirely unarmed and in his stocking feet; that defendant had no fear for his life; that he did not make proper effort to avoid the difficulty; that the use of the knife was unnecessary.

The appellant assigns seven errors. The first, second, third, and seventh have to do with the sufficiency of the evidence. The fourth and fifth refer to the matter of instructions. The sixth alleges error in the admission of evidence. We will consider these in the inverse order. The sixth assignment is indefinite and uncertain. No reference is made to any particular ruling of the court and no argument is made upon this assignment. Neither is there any argument made as to the fourth and fifth assignments, and we do not think they are well taken. The instructions given by the trial court appear to have been fully as favorable as defendant was entitled to. The instructions numbered 5 and 12, requested by the defendant and refused by the court, are in themselves faulty, inapplicable, or have to do with subject-matters which are fully and properly covered by the instructions given by the court.

We come now to the main question in the case, which is as to the sufficiency of the evidence to sustain the verdict and judgment. It was admitted on the part of defendant in the

opening statement of his counsel in the trial, and again in his brief here, that the defendant used a knife upon the person of the decedent at the time alleged, and that from the effects of the wounds thus inflicted the decedent died, and that this admission was sufficient to establish a *prima facie* case on the part of the state. This being true, it was then for the jury to say, under proper instructions, whether or not the evidence showed a legal justification or excuse for the stabbing. The jury were told that the reasonableness of the apprehension of danger must be judged from the defendant's standpoint at the time of the alleged cutting; that they must take into consideration all the circumstances surrounding and existing there at that time. They were also told that it was not necessary that the assault made by the deceased upon defendant should have been made with a deadly weapon; that "an assault with a fist alone, if there was an apparent purpose to inflict death or serious bodily injury by the deceased upon the defendant, is sufficient to justify the killing in self-defense, if the defendant at the time had reason to believe, and did believe, that he was in imminent danger of death or great bodily harm at the hands of the deceased, supposing that the defendant acted reasonably as a reasonable man under the circumstances."

The jury had a right to take into consideration the size of the men respectively, the fact and manner of defendant first accosting decedent, the fact that the decedent was unarmed, the opportunity of defendant to close and lock his door, his apparent ability to have resisted the assault of decedent without the use of a knife, the character of the conversation between the two men, the credibility of defendant's testimony, the question of his good faith in using the knife, the character of the assault upon and threatened danger to defendant, the reasonableness under all the circumstances of defendant's apprehension of serious bodily injury; and from all of these things, and all other matters shown by the evidence and the conditions and circumstances surrounding the

parties, they were to decide whether or not the defendant was justified in using a knife upon decedent in the manner shown. We think the evidence of the defendant clearly presented this question of fact for the determination of the jury. This question having been by the trial court, upon sufficient competent evidence, submitted to the jury under instructions well calculated to fully protect all of his rights, and that court having denied a motion for a new trial, we think the verdict must be held conclusive.

The judgment is affirmed.

HADLEY, C. J., DUNBAR, RUDKIN, CROW, FULLERTON, and MOUNT, JJ., concur.

[No. 6766. Decided September 28, 1907.]

RHODIA E. DAVIE, *Respondent*, v. JOHN T. DAVIE, *Guardian of Everett Davie, a Minor, Appellant*.[1]

GIFTS—CAUSA MORTIS—INTENTION—DELIVERY—EVIDENCE — SUFFICIENCY. The evidence is sufficient to show intention to make a gift *causa mortis* and delivery, where it appears that, after a protracted illness, and four or five days before his death, the donor and his wife contracted to sell land, making a deed to be placed in escrow until full payment, and that the donor stated that the papers were his wife's, that he would give them to her to be placed in escrow in her name, so that if anything should happen to him she would have a home, and on the same day the papers were handed to his wife; there being no evidence of undue influence, and no creditor complaining thereof.

SAME—PROPERTY SUBJECT—LAND—FRAUDS, STATUTE OF. A gift, *causa mortis*, of a contract for the sale of land, deed for which was executed by the donor and placed in escrow until full payment, is not an oral gift of real estate or void under the statute of frauds, but is to be treated as personal property, being simply the proceeds from the sale.

[1]Reported in 91 Pac. 950.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., in probate, entered December 8, 1906, in favor of the plaintiff, confirming the action of an administratrix in omitting to include certain real property in her inventory. Affirmed.

Munter & Lovejoy, for appellant.

W. D. Scott, for respondent.

Root, J.—One William Davie died intestate, in the city of Spokane, leaving a widow, respondent Rhodia E. Davie, whom he had married about a year previously, and a minor son by a former wife, Everett Davie. The widow was appointed administratrix and the appellant, John T. Davie, was appointed guardian of the minor. The administratrix filed her inventory, but failed to include therein certain real estate which it is claimed by appellant the decedent owned at the time of his death. Upon appellant's petition, citation was issued requiring respondent to show cause why said real estate should not be included in the inventory. To this an answer was made, whereupon a hearing was had, which resulted in findings and conclusions and a decree in favor of the widow. From said decree this appeal is prosecuted.

The evidence shows that, after a protracted illness, and some four or five days before his death, said William Davie and his wife executed a contract for the sale of said real estate to one Tipton, and at the same time executed a deed of conveyance of said real estate to said Tipton, which deed was to be held in escrow until the payments called for by the contract should be made. Negotiations leading up to the sale had been pending several months. The contract and deed appear to have been prepared by one Boyd, who was a partner in the real estate business with Tipton, and who was present when the papers were signed and acknowledged. In regard to the transaction, Mr. Boyd, among other things, testified: "After the contract and deed were executed, I

asked Mr. Davie what was to be done with the papers, to which Mr. Davie replied: 'It is hers. I will give them to her. She will come down and place them in escrow in her name, so that she can handle it.' In the course of the conversation he stated: 'If anything happens to me, it will leave the widow in pretty good shape. It will leave her a home.' "

It appears that Mrs. Davie placed the papers in escrow in accordance with said suggestions of Mr. Davie. The latter had signed the papers while in bed and quite sick, and lived but four or five days thereafter. Another witness, one Johnson, a notary public, who was present when Mr. Davie signed these papers, and who took the acknowledgment of Davie and wife, testified among other things, as follows: "He made the remark that if anything should happen to him, he said: 'My widow' or 'my wife will have a home.' " Mrs. Davie was upon the witness stand and testified to the papers being signed, and was asked: "At that time what was done with the papers?" Answer: "They were handed to me at that time, that day—it was on the afternoon of the 28th of March, and the next day I took them up and had them put in escrow as I was told to do." She was asked as to what was said at the time, but objection being made, she was not permitted to state.

It is urged by the appellant that the evidence is not sufficient to establish a gift; that there is no sufficient evidence of a delivery; that the attempt to make a gift was the result of undue influence, and that it was an attempt to make a gift of real estate, which could not be done orally.

We think, under all the circumstances of this case, that the evidence shows an intention of the decedent to make a gift *causa mortis*. No creditor is complaining. No one appears to be interested except this minor child. Other property was left by the decedent. There are no circumstances shown in connection with the case to cast thereupon any suspicion of undue influence, fraud, or misrepresentation. It would seem to be but a natural thing for a man in the expectation of near

approaching death to make a gift of this kind to his wife. In *Phinney v. State ex rel. Stratton*, 36 Wash. 236, 241, 78 Pac. 927, this court said:

"It is now conceded by all modern authority that every species of personal property capable of delivery, either constructive or actual, may be the subject of a gift *mortis causa*."

In the same case, it was said, touching the question of delivery:

"But, in the very nature of business transactions of this kind, this delivery must frequently be constructive. The nature and circumstances surrounding this case necessitated a constructive delivery. The subject of the gift was not available. . . . So that, in justice and common sense, it seems to us that the delivery was complete, and that the will of the deceased ought not to be thwarted by any technical construction or definition of delivery."

This language is applicable here. Decedent was giving the proceeds from the sale of the land to be paid upon, and according to the terms of, the contract. There was no way of making a delivery except by placing in her possession the written contract and escrow deed, which was done. We think this was sufficient.

With the contention that this was real estate and could not be legally made the subject of an oral gift, we cannot agree. Decedent and his wife had made a contract to sell this property. They had executed a deed to be held in escrow to be delivered when the purchaser should complete his payments as called for in said contract. Having done this, the interest in the real estate became such as is ordinarily treated as personal property in matters of administration. He was virtually giving her the proceeds coming from the sale. In the case of *Griggs Land Co. v. Smith*, 46 Wash. 185, 89 Pac. 477, this court said:

"But in the case at bar, the owner of the land had made a contract to convey and he could leave to his heirs only the interest then owned, which was virtually but the right to the

proceeds—the holder of the contract being entitled to have the land conveyed to him upon paying the purchase price. In such cases the courts have treated the property, for purposes of administration, as personal rather than real. A recognition of this doctrine may be found in *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249."

See, also, *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648; *Noble v. Whitten*, 38 Wash. 262, 80 Pac. 451; *Guinan's Appeal*, 70 Conn. 342, 39 Atl. 482; 26 Am. & Eng. Ency. Law (2d ed.), pp. 721-726; 14 Am. & Eng. Ency. Law (2d ed.), pp. 1063, 1068; 7 Am. & Eng. Ency. Law (2d ed.), p. 471; 9 Cyc. 826; 7 Current Law, p. 1881.

We think the decree of the trial court should be affirmed, and it is so ordered.

HADLEY, C. J., RUDKIN, DUNBAR, CROW, FULLERTON, and MOUNT, JJ., concur.

[No. 6658. Decided October 7, 1907.]

THE STATE OF WASHINGTON, *on the Relation of John D. Atkinson, Attorney General, Respondent*, v. CO-OPERATIVE HOMEBUILDERS, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR. Error in refusing to strike interrogatories intended to disclose the nature of plaintiff's business is harmless where the same sufficiently appeared from other competent evidence.

BUILDING AND LOAN ASSOCIATIONS — WHAT CONSTITUTES — AUTHORITY TO DO BUSINESS. A foreign corporation is not authorized to transact business in this state, without compliance with the statutes relating to building and loan associations, where the general purpose of its business is the creation of a fund by small periodic payments from which loans may be made to those who are otherwise unable to obtain them through inability to give security, on any general plan similar to that of an ordinary building and loan association.

[1]Reported in 91 Pac. 953.

SAME—LOAN TO NONMEMBERS—PENALTY. The fact that loans are to be made to nonmembers does authorize such a corporation to do business in this state without compliance with the building and loan statute, since the statute authorizes loans to nonmembers and no penalty is prescribed for doing business in violation of the statute.

SAME. The fact that such corporations are amenable to the usury laws does not affect their right to do business without compliance with the statute.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 11, 1906, upon findings in favor of the plaintiff, after a hearing on the merits before the court without a jury, enjoining the operations of a foreign corporation within the state. Affirmed.

Harold Preston and *F. R. Burch*, for appellant.

The Attorney General and *J. B. Alexander*, *Assistant* (*F. C. Kapp*, of counsel), for respondent.

RUDKIN, J.—This action was instituted by the state, on the relation of the attorney general, to enjoin the defendant from transacting a saving, loan and investment business on the building society plan, within the state, and for other purposes. Judgment was given below according to the prayer of the complaint, and the defendant has appealed therefrom.

A motion was interposed to strike certain interrogatories propounded to the appellant, and the ruling of the court denying this motion is the first error assigned. The appellant contends that the action was instituted to enforce a penalty or forfeiture, and that in such cases a party will not be compelled to make discovery. The principal question in the case was the nature of the business transacted by the appellant in this state, and inasmuch as that sufficiently appeared from other competent evidence, the striking of the interrogatories and the answers thereto would not change the result. We therefore deem it unnecessary to discuss the nature of the proceedings or the ruling of the court on the motion to strike.

It is admitted that the appellant is a foreign corporation, organized and existing under the general laws of the state of California, and that it has not complied with the provisions of the act of March 28, 1890, entitled, "An act relating to building, loan and saving associations doing a general business." Laws 1890, page 56 [Bal. Code, §§ 4395-4433 (P. C. §§ 7128-7166)]. If the appellant is a corporation, society, organization or association, doing a saving, loan or investment business on the building society plan, whether neutral or otherwise, and whether issuing certificates of stock which mature at a fixed time or not, as defined by § 22 of the building and loan association act, the judgment should be affirmed, but otherwise it must be reversed. The generally accepted definition of a building and loan association is the following:

"The building association as now existing, is a private corporation, designed for the accumulation by the members of their money by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes, the borrowing members paying interest and a premium as a preference in securing loans over other members, and continuing their fixed periodical installments in addition, all of which payments, together with the non-borrower's payments, including fines for failure to pay such fixed installments, forfeitures for such continued failure of such payments, fees for transferring stock, membership fees required upon the entrance of the members into the society, and such other revenues, go into the common fund until such time as that the installment payments and profits aggregate the face value of all the shares in the association, when the assets, after payment of expenses and losses are prorated among all members, which in legal effect, cancels the borrower's debt, and gives the non-borrower the amount of his stock." Thompson, Building Associations, page 2, § 2.

The nature of the business transacted by the appellant in this state appears from the following provisions of the contract entered into with its patrons or subscribers:

"The California, Oregon & Washington Homebuilders' Association, a corporation of the state of California, party of

the first part, and ————————, party of the second part, agree, the one with the other, and with all others executing similar mutual co-operative contracts, as follows:

"The object of this agreement is the acquisition of a home or farm or the discharge of a mortgage by the holder of this contract, he making small monthly payments and co-operating with others, executing similar contracts and to the same purpose.

"In consideration of the mutual benefits to be derived from the faithful performance of the mutual covenants herein mentioned, by the parties hereto, and the monthly installments to be paid by one to the other, it is agreed by them as follows:

"1st. The party of the first part shall number, date and register each contract in this series in numerical order as applications for same are received at its home office, and all benefits accruing under this contract shall be in accordance with said numerical order of registration. Provided, however, the party of the first part reserves the right to consolidate one or more series with this one by interpolating half numbers or maturing the same numbers, or set of numbers, in each series, alternately, thereby augmenting the Home Maturity Fund as well as the numbers.

"2nd. The party of the second part shall at the signing of his contract have paid thereon as a registration fee, to the party of the first part, the sum of five dollars ($5.00), and shall also pay thereon a further sum of two dollars and fifty cents ($2.50) each month, on or before the 20th day thereof—two dollars ($2.00) of which sum shall be placed to the credit of the second party, in what shall be hereafter known as the Home Maturity Fund, and said sum of two dollars ($2.00) shall be applied on the installment purchases of homes or to the discharge of mortgages according to the co-operative plan aforesaid; and fifty cents (0.50) shall be placed to what is herein termed the Expense Fund, and shall go to the party of the first part for the expenses of said Association.

"3rd. This contract, if it is the lowest number not then matured, shall be deemed to have matured when, from the continued monthly payments into the Home Maturity Fund on this and like contracts in this series, there shall on the first day of any calendar month have accumulated in the Home Maturity Fund of said Association the sum of seventy-five dollars ($75.00), the Association having discharged all obligations

then due on outstanding matured contracts. As soon as this contract shall have matured, then the holder thereof shall be entitled to an installment sum of seventy-five dollars ($75.00) per month to be applied toward the payment of a home or the discharge of a mortgage for such contract owner, until the sum of one thousand dollars ($1,000.00) shall in this manner be paid, which process shall continue in like manner with each maturing contract. When the sum of one thousand dollars ($1,000.00) shall have been paid for the benefit of the party of the second part, then this contract on the part of the party of the first part shall be performed. When this contract matures as aforesaid, and until the party of the second part shall select and arrange for the purchase of real estate, or to build a house or to discharge a mortgage on a lot, owned by him, the said sum of seventy-five dollars ($75.00) per month shall be kept and accumulated by the party of the first part, and paid out only on a home or mortgage for the said party of the second part.

"4th. Upon the maturity of this contract, and annually thereafter, the party of the second part shall pay to the party of the first part, the sum of six dollars ($6.00) over and above all other payments herein provided for, which shall go into what shall be hereafter known as the Equalization Fund.

"5th. The said party of the second part shall obtain a complete abstract of title to the property to be purchased, or upon which a building is to be erected or a mortgage is to be discharged, to be examined by the party of the first part, at the expense of the party of the second part, and if the property, title and contract of purchase be approved by the party of the first part and the same be ordered purchased by the party of the second part, or the mortgage discharged, the contract of purchase or conveyance shall be made by the party of the first part with the owner of the property, and the party of the first part shall pay on said contract of purchase or conveyance or mortgage for the benefit of said party of the second part the sum of seventy-five dollars ($75.00) per month, as aforesaid, and the party of the second part shall execute a deed of trust or mortgage or a contract giving the party of the first part, or someone they may designate, a lien on said land in such way and kind as the attorney of the party of the first part may determine to be necessary; and, upon maturity of this contract, the party of the second part

shall pay to the party of the first part on or before the 20th day of each month, an additional sum of two dollars and fifty cents ($2.50) a month over and above the two dollars and fifty cents ($2.50) heretofore provided for; or the sum of five dollars ($5.00); fifty cents ($0.50) of which sum shall be paid to said party of the first part for the expense of conducting its business, and the sum of four dollars and fifty cents ($4.50) shall be placed to the credit of the party of the second part in the Home Maturity Fund aforesaid, and shall go to pay off obligations of the party of the first part, for homes purchased or mortgages discharged, by the provisions of this and similar contracts.

"6th. When the monthly payments of four dollars and fifty cents ($4.50) into the Home Maturity Fund shall aggregate the sum of one thousand dollars ($1,000.00), less the amount the second party has to his credit in the Home Maturity Fund before maturity, and all other conditions of this contract shall have been complied with, then the first party shall convey to said second party, or contract holder, all its interest in said property.

"7th. This contract may be assigned, upon payment of two dollars ($2.00) to said first party, the consent of said first party having first been obtained in writing."

From the foregoing provisions it is quite apparent that the general purpose of the appellant and the ordinary building and loan association is identical, viz., the creation of a fund by small periodic payments from which loans may be made to those who are otherwise unable to obtain them, because of their inability to give security. Building associations exist in one form or another in nearly all the states. In some they are organized under general incorporation laws, in others there are a few general statutory provisions in reference to them, while in still others the statutes contain elaborate provisions relating to their formation and the conduct of their business. For these reasons, while the general plan and purpose of all such associations is the same, their methods of transacting business are by no means uniform. Thus, some loan to members only, others to non-members; some loan for a specific pur-

pose, others for any purpose; some loan to the highest bidder at auction, others at a fixed premium; in some the stock matures at a fixed time in advance, others contra; some are on the terminating plan, while others are permanent, and diverse other features we need not mention.

If the general plan and purpose of the appellant is similar to that of the ordinary building and loan association, why does it not fall within the definition of our statute. One reason assigned is that the persons with whom these contracts are entered into and to whom loans are made are not members of the corporation or association. In support of this view *Attorney General v. Pitcher*, 183 Mass. 513, 67 N. E. 606, is cited. It was there held that a statute forbidding any person, association or corporation, except certain licensed ones, to transact the business of accumulating the savings of its members and loaning to them such accumulations, in the manner of a cooperative bank, unless incorporated within the commonwealth for that purpose, was not violated by a corporation whose *modus operandi* was much the same as that of the appellant. Two reasons were assigned for the decision; first, because the statute was penal and should be strictly construed; and second, because "the purchasers of these contracts are not members of the association, and their savings are not savings of members but of holders of individual contracts from the association. They have no voice in the management of the affairs of the association. No money of members of the association is lent to any of its members. The savings of these contractors are not accumulated and lent to them in the manner of a cooperative bank, but the course of dealing is very different from that of any bank." The court added significantly, however, "It may well be said that all the reasons for the enactment of this statute apply with great force to an association transacting business like that of these defendants."

We do not consider this case controlling for two reasons: First, the Massachusetts statute imposed a penalty of not more than $1,000 for its violation, and the rule of strict construction obtained, while our statute imposes no penalty on the corporation itself, and this court has uniformly given a liberal construction, in favor of the public, to statutes relating to the formation of domestic corporations, or to the right of foreign corporations to transact business within the state. *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462; *State ex rel. Gorman v. Nichols*, 40 Wash. 437, 82 Pac. 741; *State ex rel. Amalgamated Republic Mines Co. v. Nichols*, *ante* p. 117, 91 Pac. 632. Second, our statute permits building and loan associations to loan to non-members. Laws 1903, p. 219, § 5.

Another line of cases arising under the usury law is relied on. Our statute provides that "No premium taken for loans, nor amounts charged for expenses, as allowed in this act nor any payments on account of installments of stock made by a borrowing member shall be considered as a repayment on his loan, or shall render such association amenable to the laws relating to usury." Laws 1903, p. 219, § 4; and other states have similar enactments. It has frequently been held under such statutes that associations transacting a business similar to that of appellant are not exempt from usury laws. The reason for the rule is thus stated in *Skinner v. Southern Home Building & Loan Ass'n*, 46 Fla. 547, 35 South. 67:

"By the use of the term 'building society plan' the legislature must have had reference to some definite plan, and not to whatever scheme under a like name might be devised in the various states or foreign countries; and hence it is not improper to assume the legislators, in the use of such term, must have had in mind the plan with which they were familiar —that is, the auction plan."

In a similar case the supreme court of Illinois said:

"It has been well said by the supreme court of Maryland 'that every device and shift which the wit of man could sug-

gest have been invoked to exempt contracts for illegal interest from the operation of the law, but courts should look under the mask to discover the true nature of the real transaction.'" *Rhodes v. Missouri Savings & Loan Co.*, 173 Ill. 621, 50 N. E. 998.

We think a different rule should obtain in this class of cases. Our legislature no doubt had in mind the schemes and devices that might be resorted to by associations from other states and from foreign countries to evade our laws, and doubtless intended that the general and comprehensive definition given should apply to and exclude all such associations from our borders. It is the duty of the court to look at the substance rather than the mere form, and we are convinced that public policy and our statute fairly construed demand that the appellant should comply with our laws or cease operations here.

There is no error in the record, and the judgment is affirmed.

HADLEY, C. J., FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 6747. Decided October 7, 1907.]

In the Matter of the Petition for Regrade of JACKSON STREET ET AL., SEATTLE.[1]

EMINENT DOMAIN—TRIAL—VIEW BY JURY. A view of premises by a jury may be ordered in condemnation proceedings, under Bal. Code, § 4998, authorizing such views in civil actions; nor is said section limited by the act (Bal. Code, § 783) authorizing a view in condemnation proceedings without making provision for any person to point out the place.

TRIAL—VIEW BY JURY. Under Bal. Code, § 4998, the court may appoint a person other than an officer to point out a place to be viewed by a jury.

[1]Reported in 91 Pac. 970.

SAME—OBJECTIONS—NEW TRIAL—APPEAL—HARMLESS ERROR. The objections that a person appointed to point out property to a jury in making a view is an interested witness, and was not sworn, are too late if first made on motion for a new trial; and are not ground for reversal unless it is shown that a substantial right of the party was prejudiced.

EMINENT DOMAIN—DAMAGES—MITIGATION—EVIDENCE. Upon an issue as to the damages from the regrade of a street, evidence as to whether buildings, the foundations of which were destroyed, could be moved back or lowered or removed, is admissible.

SAME—INSTRUCTIONS—MUNICIPAL CORPORATIONS—LICENSE TO OCCUPY STREET. Upon an issue as to whether damages from the regrade of a street might be mitigated by the temporary removal of the buildings into the street, the court properly refused to instruct that the city could not grant an exclusive franchise for the use of any street, since the city might license the temporary occupancy of the street for such a purpose.

SAME—VERDICT—SEPARATE FINDINGS. It is only where property is taken, and not where it is damaged, that the jury may be required to make separate findings on the damages to buildings thereon and on the value of the buildings to be removed.

SAME—TRIAL—RECEPTION OF EVIDENCE. Where the city, at the commencement of the trial, offered the petition and certain documentary evidence to show its right to condemn, it is not necessary to reoffer the same upon taking up the question of damages to any particular property, and the same is in evidence for all purposes.

Appeal by defendants from a judgment of the superior court for King county, Poindexter, J., entered December 7, 1906, upon the verdict of a jury in condemnation proceedings. Affirmed.

G. Ward Kemp, for appellants.

Scott Calhoun and *O. B. Thorgrimson*, for respondent.

RUDKIN, J.—This is an appeal by property owners from a judgment entered on the verdict of a jury in a condemnation proceeding, instituted by the city of Seattle. The appellants were the owners of lots 5 and 6, of block 48, of D. S. Maynard's plat, situated on the corner of King street and Seventh avenue. The plan adopted for the regrade of Jackson and

other adjacent streets of the city called for a cut of approximately 45 feet in the streets abutting on the appellants' premises. This cut was to be made with one to one slopes, so that the top of the cut would extend approximately 45 feet back on the adjacent lots, and would destroy, in whole or in part, the foundations of some four or five buildings situated on the appellants' lots and owned by them. During the progress of the trial the court directed that the jury view the premises in charge of Mr. Alexander, one of the bailiffs of the court, and that a Mr. Jeffrey, the same person who pointed out the King street property to them, should also point out this particular tract. At the time this order was made, the appellants interposed a general objection "to the court allowing Mr. Jeffrey or any person to go with the jury except the bailiff," and excepted to the court's ruling. In an affidavit filed in support of a motion for a new trial, the further objection was raised that Mr. Jeffrey was an officer of the city and a witness on the trial, and was not sworn to perform any duty except as such witness. For reasons hereinafter stated, the specific objections raised by the motion for a new trial cannot be urged at this time. The general statutes of the state provide that:

"Whenever in the opinion of the court it is proper that the jury should have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place, which shall be shown to them by the judge, or by a person appointed by the court for that purpose." Bal. Code, § 4998 (P. C. § 612).

This section is broad enough to cover condemnation proceedings, and expressly authorizes the court to appoint a person other than a bailiff to point out the place or property to the jury. Nor, in our opinion, is the scope of this section limited by the provision of the act under which this proceeding was instituted, authorizing the court upon motion of the city, or of any person claiming compensation to "direct that said jury (under the charge of an officer of the court) shall view

the premises which it is claimed by any party to said proceeding will be taken or damaged by said improvement." Bal. Code, § 783 (P. C. § 5057). A view in many cases would be futile unless the judge or some person by him appointed was authorized to point out the particular place or premises to the jury, and we are satisfied that such a power exists in the courts of this state. Objections to the personnel of the person appointed or that he was not sworn should be taken at the time of the appointment, and cannot be urged for the first time on motion for new trial. *In People v. Johnson*, 110 N. Y. 134, 17 N. E. 684, the court said:

"The omission of the trial court to cause the officer in charge of the jury, while taking a view, to take the oath prescribed by § 412, was an irregularity merely, which could be waived by the defendant, and was, we think, by the consent of his counsel that such view should be taken, and by his omission to object or call the attention of the court to the want of such oath."

The court further added:

"However that may be, it was, upon the facts in this case, a question for the court to determine whether any substantial right of the defendant had been prejudiced by the conduct complained of, and we do not think there is any sufficient reason for us to interfere in the conclusion reached by it in respect thereto."

Here, also, there is an utter failure to show that any substantial right of the appellants was prejudiced by the conduct complained of.

Testimony was admitted tending to show that some of the buildings might be lowered, or moved off the premises and moved back, after the lots were cut down to the regrade. The admission of such testimony is assigned as error. The testimony was so slight and general in its character that it would be difficult to predicate any prejudice upon its admission, but in any event the buildings were not taken, and the question whether they were a total loss to the owners, or could be low-

ered or moved back onto the lots after the regrade, would seem to be material. The question whether this could be done, or whether there was any place to put the buildings in the meantime, would go to the weight rather than to the competency of the testimony.

Error is next assigned in the refusal of the court to give the following instruction:

"The jury are instructed that the city of Seattle is prohibited by its charter from granting to any person an exclusive franchise for the use of any of the city streets or any part of the street;"

and other instructions of like import. These instructions were offered in answer to the contention of the city that the buildings might be moved into the streets while the lots were being cut down. It is a well-known fact that cities daily license persons to occupy portions of the streets while the streets or abutting property are undergoing improvements, and their right to do so is seldom questioned. The charge was properly refused.

The failure of the court to require the jury to make separate findings on the damages to the buildings, and the value of the buildings to the owners to remove, is also assigned as error. No request for such a direction was made and no exception was taken to the failure of the court to so charge. Under such circumstances it may well be doubted whether the question of the court's failure in that regard can be raised for the first time on motion for a new trial. But, without resting our decision upon that ground, the contention of the appellant cannot be sustained. The statute under which these proceedings were instituted, Bal. Code, § 775 *et seq.* (P. C. § 5050), makes a clear distinction between the taking and damaging of property. Whether such distinction is well founded in law we need not inquire, for it is only where property is taken within the purview of the statute that such findings are required. Bal. Code, § 784 (P. C. § 5058). The property in

this case was damaged only, and the above provision has no application.

In the course of the argument to the jury the question arose whether a certain property owner's petition was properly in evidence, and the court ruled that it was. This ruling is assigned as error. The defendants in the action were exceedingly numerous, and at the commencement of the trial the city offered certain documentary testimony of a general nature for the purpose of showing its right to institute the proceedings, such as the property owners petition, the city ordinances relating to the improvements, etc. It was not necessary to reoffer this documentary evidence every time the court took up the claim for damages to a particular tract, and the court correctly ruled that such evidence was in the case for all purposes.

The judgment is sustained by competent testimony, and there being no error in the record, the same is affirmed.

HADLEY, C. J., FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 6830. Decided October 7, 1907.]

THE COLUMBIA CANAL COMPANY, *Respondent*, v. W. L. BENHAM, *Appellant*.[1]

COURTS—JURISDICTION—PUBLIC LAND. A state court has no jurisdiction to determine the equities of claimants to public lands by enjoining the prosecution of a claim before the land department or requiring a relinquishment of a claim, when the title is still in the United States and the land office has not determined the right to a patent.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 26, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, enjoining proceedings to obtain title to public lands. Reversed.

Jesse A. Frye, for appellant.

Shank & Smith, for respondent.

RUDKIN, J.—This is an appeal by the defendant from the following decree entered against him in the court below:

"It is hereby ordered, adjudged and decreed that the defendant be and he hereby is restrained and enjoined from proceeding further in any manner whatever, in person or by agent or attorney, to obtain title to the northwest quarter (N. W. 1/4) of section ten (10), in township seven (7) north, range thirty-one (31) east, in Walla Walla county, Washington, whether under his entry of the said land as desert land, filed in the United States Land Office at Walla Walla, Washington, on, to wit, August 2, 1906, or otherwise; and that defendant, his agents or attorneys and each of them be and they hereby are forbidden and enjoined from taking any steps in the matter of the said entry or any other proceedings in the land office of the United States in connection with the said land, save and except only as hereinafter directed.

[1]Reported in 91 Pac. 961.

"And it is further ordered and decreed that the defendant do forthwith file, or cause to be filed, in the United States Land Office at Walla Walla, Washington, a relinquishment of all claims to said land the whole thereof, and that in the event of his failure so to do within twenty (20) days from this date, Heber M. Hoyt, Esquire, a member of the bar of this court, who is hereby appointed commissioner for the purpose, shall forthwith, in the name and as the act of said defendant, execute such relinquishment in due and proper form, and cause the same to be filed in said land office, with certified copies of findings, conclusions and decree. But such relinquishment by the commissioner shall not of itself relieve the defendant from making relinquishment in person as hereinabove ordered."

In view of the conclusion we have reached on the question of the court's authority to enter such a decree, we deem it unnecessary to make a further statement of the case, except to say that the lands described in the decree are public lands of the United States, and the appellant has made entry thereof under the provisions of the desert land act, in the proper land office. Notwithstanding the innumerable attempts that have been made through the courts to control the action of the land department in disposing of the public domain, the respondent has been unable to cite a single precedent for such a decree; and after an exhaustive examination of the authorities, this court has been equally unsuccessful. We are satisfied, however, that the authority to enter the decree has been repeatedly denied by the supreme court of the United States in analogous cases. In *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800, the court, speaking through Mr. Justice Miller, said:

"It plainly appears from this, first, that the defendants had not the legal title; second, that it was in the United States; and, third, that the matter was still *in fieri*, and under the control of the land officers. Nothing in record of the case before us gives evidence that any further steps in that department have been taken in the case. We have repeatedly held that the courts will not interfere with the officers of the government while in the discharge of their duty in disposing of the public

lands, either by injunction or mandamus. *Litchfield v. Register and Receiver*, 9 Wall. 552; *Gaines v. Thompson*, 7 Id. 347; *The Secretary v. McGarrahan*, 9 Id. 298. *And we think it would be quite as objectionable to permit a state court, while such a question was under the consideration and within the control of the executive departments, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree in advance of the action of the government, which would render its patents a nullity when issued. After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before. Johnson v. Towsley*, 13 Id. 72; *Shepley v. Cowan*, 91 U. S. 300."

The doctrine of this case has been reaffirmed in many subsequent cases in the same court. *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Carrick v. Lamar*, 116 U. S. 423, 6 Sup. Ct. 424, 29 L. Ed. 677; *Cruickshank v. Bidwell*, 176 U. S. 73, 20 Sup. Ct. 280, 44 L. Ed. 377; *Kirwan v. Murphy*, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064; *Humbird v. Avery*, 195 U. S. 480, 25 Sup. Ct. 123; *Oregon v. Hitchcock*, 202 U. S. 60, 26 Sup. Ct. 568. To the same effect, see, also, *Casey v. Vassor*, 50 Fed. 258; *Forbes v. Driscoll*, 4 Dakota 336, 31 N. W. 633; *Vantongeren v. Heffernan*, 5 Dakota 180, 38 N. W. 52; *Hays v. Parker*, 2 Wash. Ter. 198, 3 Pac. 901.

In *McCord v. Hill*, 104 Wis. 457, 80 N. W. 735, the court said:

"It is only after the United States has parted with its title, and the individual has become vested with it, that the equities on which he holds it may be enforced, and not before. . . . Such being the law, a complaint which seeks to have the court adjust equities between rival claimants to government land is fatally defective if it fails to show that the title has become vested in the individual against whom it is sought to enforce supposed equities."

In *Sims v. Morrison*, 92 Minn. 341, 100 N. W. 88, the court said:

"The rule applies with greater force to the case at bar, for here the legal title to the land is in the general government, with no certainty that it will ever become vested in defendants, and the rights of both are purely equitable. The government has the paramount and sole authority to dispose of its lands, and until it parts with and conveys its title, the courts are powerless to aid litigants in controversies affecting or involving individual claims thereto."

So far as we have been able to discover, there is no dissent from these views. The right of the respondent to maintain this action must rest upon some equity it has or claims in the land sought to be entered, which is now public land of the United States. If it has such an equity—and upon that question we express no opinion—the courts are powerless to grant relief until the title passes from the general government. The respondent cites the case of *Rader v. Stubblefield* from this court, reported in 43 Wash. 334, 86 Pac. 560, in support of its contention. The difference between enjoining the prosecution of an action *inter partes* in another court, and enjoining the prosecution of a claim for public land before the special tribunal charged with the administration of the public land laws is apparent.

The judgment appealed from was in excess of the jurisdiction of the court, and is without warrant or authority in law. Reversed and remanded.

HADLEY, C. J., FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 6669. Decided October 8, 1907.]

In the Matter of the Estate of WILLIAM A. MILLER, *Deceased.*[1]

WILLS—PROBATE—NUNCUPATIVE WILL — VARIANCE — AMENDMENT. Upon the probate of a nuncupative will, the court may, in the exercise of its sound discretion, permit the alleged will and records to be amended to conform to the facts found.

SAME—TIME OF LAST SICKNESS—NECESSITY OF EXTREMIS. A nuncupative will is made "during the last sickness" of the testator, without reference to the fact of extremis or that there was opportunity to reduce it to writing, where the testator expected he was in his last sickness and about to die, and did thereafter die thereof.

Appeal from an order of the superior court for Columbia county, Miller, J., entered July 9, 1906, establishing a nuncupative will and admitting the same to probate. Affirmed.

Will H. Fouts and *G. W. Jewett*, for appellant.

M. M. Godman, for respondents.

RUDKIN, J.—This is an appeal from an order establishing a nuncupative will and admitting the same to probate. Upon the hearing of the petition for probate, the court found, "That the instrument filed herein and alleged to be the will of said Miller is not the entire or all the will made by him as shown from the evidence taken herein:" and granted "leave to reduce or have reduced to writing and file herein the nuncupative will of said William A. Miller, as shown from the evidence to have been made by him, and upon the filing of the same such proceedings be had and as the law may warrant in the premises." Thereafter the will, "as shown from the evidence to have been made," was reduced to writing and filed with the clerk; whereupon the court entered an order establishing the will and admitting the same to probate.

[1]Reported in 91 Pac. 967.

The appellant seems to contend that as soon as it appeared that the entire will of the testator was not in form and substance as reduced to writing and set forth in the petition for probate, the court had no alternative but to dismiss the petition. This contention is unsound. In the exercise of a sound discretion, the court might well permit the alleged will and its records to be amended to conform to the facts proved, and such discretion was properly exercised in this case. Again, it is contended that the evidence failed to show either the *animus testandi* or the *animus nuncupandi;* or that the testator called upon any person present to bear witness that such was his will. Without discussing the testimony in detail, we think it clearly appears that the testator was strongly impressed with the probability of impending death, that he intended to make a will, and that his word should stand as his will; and that he called upon those present to bear witness that such was his will, or to that effect, as our statute provides.

It is next contended that the will was not made "at the time of the last sickness" of the testator. Bal. Code, § 4609 (P. C. § 2355). This presents the most serious question in the case. In the leading American case, construing the term "last sickness," in Statutes of Wills, the opinion was written by Chancellor Kent—*Prince v. Hazleton*, 20 Johns. 502. It was there held, by a divided court, that the term "last sickness" means, where the testator is *in extremis*, or overtaken by sudden and violent sickness, and has not time or opportunity to make a written will. This construction of the statute has been adopted and followed in Georgia, Maryland, Mississippi, New Jersey, New York, Pennsylvania, Texas, and Virginia, 30 Am. & Eng. Ency. Law (2d ed.), p. 568. A different rule prevails in Alabama, Illinois, Kansas, Nebraska, and Tennessee. In *Johnston v. Glasscock*, 2 Ala. 218, the court said:

"If a person in his last sickness—that sickness of which he subsequently dies — impressed with the probability of approaching death, deliberately makes his will, conforming to the statute, we do not feel authorized to say that it will be

invalid, because, in point of fact, he had time and opportunity to reduce it to writing."

In *Harrington v. Stees*, 82 Ill. 50, 25 Am. Rep. 290, the court said:

"At common law, it was not essential to the validity of a nuncupative will that the testator should have been ill at all. The statute is, in this regard, a limitation of the common law powers. The words 'in the time of the last sickness' had no technical signification at the time of the passage of the statute. These words must be taken in their ordinary signification. The courts have no power to take from or add to the statute. It is their duty to carry out the will of the legislature as found in the words of the statute, and the necessary and reasonable implications arising from these words. The statute requires it to be proven that the will was made 'in the last sickness.' It is a reasonable and necessary implication that it must also appear that the testator, at the time of making the will, supposed that his then sickness would prove his last sickness—in other words, that he should be impressed with the probability that he would never recover."

To the same effect, see *Nolan v. Gardner*, 7 Heisk (Tenn.) 215.

In *Baird v. Baird*, 70 Kan. 564, 79 Pac. 163, 68 L. R. A. 627, after referring to the two extreme views that might be adopted, the court said:

"We cannot believe that either of these extreme claims are founded in reason, but rather prefer to hold that the proper interpretation of the statute is that where the 'last sickness' of one has progressed to such a point that the deceased expects, and is liable to die at any time, and in view of its occurrence and as preparatory thereto a verbal will is made, and he does thereafter die of such disease, such will is valid and is 'made in the last sickness;' that neither prior preparation to make such verbal will, nor opportunity to make a written will at the time or thereafter, would necessarily be determinative against the validity of the nuncupation."

This rule is approved and followed in *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450. The proof clearly shows that the

will in question was made "at the time of the last sickness," as that term is construed in these decisions, and we feel constrained to follow them. Nuncupative wills are not favored in law, but it seems to us that the earlier cases not only place a strict construction upon statutes authorizing them, but go further and add very materially to the statutes themselves. We think the construction given in the later cases is more in harmony with the language and purpose of the statute; and the requirement that such wills must be strictly proved is a sufficient guaranty against fraud, at least until the legislature otherwise provides.

It is lastly contended that the testator lacked testamentary capacity and was unduly influenced in the making of the will. These charges find no support in the evidence. We find no error in the record and the judgment is affirmed.

HADLEY, C. J., FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 6731. Decided October 8, 1907.]

FRANCES CHLOPECK, *Appellant*, v. EDWARD CHLOPECK *et al.*, *Respondents*.[1]

APPEAL—REVIEW—HARMLESS ERROR. Denial of a motion to amend the prayer of a complaint so as to ask a dissolution of the partnership is not prejudicial where the court properly found that there was no partnership.

WITNESSES—COMPETENCY—TRANSACTION WITH INSANE PERSON. In an action between alleged partners, one of whom was insane, an adverse party cannot testify as to who composed the partnership, under Bal. Code, § 5991, prohibiting testimony of a transaction with an insane person by a party adversely interested.

APPEAL — PRESERVATION OF GROUNDS — EVIDENCE — PRESENTATION. Error cannot be assigned upon the exclusion of evidence the materiality of which does not appear from the questions, unless the party informs the court what he expected to prove thereby so that the court could determine its materiality.

[1]Reported in 91 Pac. 966.

APPEAL—REVIEW—HARMLESS ERROR. The admission of improper evidence is not ground for reversal in a case tried *de novo* on appeal.

PARTNERSHIP — EXISTENCE OF RELATIONSHIP — EVIDENCE — SUFFICIENCY. There is not sufficient evidence to establish a partnership relation between a mother and son from the fact that, for twenty years before the son became insane, his mother had lived with him, advanced money for, took a general interest in, and rendered services without pay in the conduct of a fish and poultry business, conducted in the name of C. Brothers, where it appears that the son transferred the business to a corporation in consideration of stock issued to him; that the mother drew money from the business for household expenses, which, after the corporation was formed, was charged to the son; and all the circumstances were as consistent with the relation of mother and son as with that of partnership, of which there was no direct testimony.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 7, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for an accounting. Affirmed.

Charles R. Crouch, *Wm. H. Brinker*, and *Morris, Southard & Shipley*, for appellant.

Ira Bronson, *D. B. Trefethen*, and *Ira A. Campbell*, for respondents.

RUDKIN, J.—This is an action for an accounting between partners. The court below found, among other things, that there was no partnership, and entered a judgment of dismissal, from which the plaintiff has appealed.

At the commencement of the trial the appellant asked leave to amend the prayer of her complaint by adding thereto a prayer for the dissolution of the copartnership. The court denied the application and this ruling is assigned as error. If the court was justified in its finding of no partnership, the ruling complained of could not be prejudicial, even though erroneous. The appellant, while on the witness stand in her

own behalf, was asked the following question: "Q. Who composed the firm of Chlopeck Brothers?" To this question the respondents objected, on the ground that the respondent Turner was defending as the guardian of an insane person, and the appellant was not competent to testify in her own behalf to any transaction had with such insane person under Bal. Code, § 5991 (P. C. § 937). This objection was properly sustained. The partnership relation could only be created through some contract or transaction with the respondent Edward Chlopeck, and he being insane, testimony in relation to such contract or transaction by the appellant in her own behalf was properly excluded. Objections were also sustained to the following questions propounded to the same witness:

"Q. What wages did you draw for such services? (Referring to services performed by the witness in superintending the smoking of fish.) Q. Did any of the employees of Chlopeck Brothers down there board with you? Q. Did you have any knowledge of money due her from Chlopeck Brothers? Q. Then, after that, Mrs. Chlopeck, when you wanted money to pay expenses, where did you get it?"

The materiality of the testimony sought to be illicited by these questions does not appear from the questions themselves, and in *Norman v. Hopper*, 38 Wash. 415, 80 Pac. 551, we held that in such cases we will not review the action of the trial court in excluding testimony, unless the party offering it informed the court what he expected to prove, and made the offer a part of the record so that the court might judge of its materiality. For these reasons we cannot review the rulings of the court in the matters complained of.

The next assignment relates to the admission of testimony over the objection of the appellant. The statements objected to were clearly hearsay and self-serving, but we have repeatedly held that the admission of improper testimony does not call for a reversal in an equity case, or in any case tried to the court. This court will simply disregard it.

The only remaining question is the sufficiency of the testimony to justify the court's finding. Briefly stated the material facts are these: The appellant and the respondent Edward Chlopeck, mother and son, resided together in Portland, Oregon, in the year 1884. In the fall of that year a fish and poultry business was purchased from one Wolfstein, and the business was thereafter conducted until 1896 under the name of Chlopeck Brothers. In 1896 the mother and son removed to Seattle, where the same business was thereafter conducted under the same name until 1900. In the latter year the business was transferred to the Chlopeck Fish Company, a corporation, the son making the transfer, and as a consideration therefor 448 shares of the capital stock of the corporation of the par value of $100 each were issued to him. In 1902 the son and the respondent Jennie Chlopeck intermarried, and the son thereupon removed from the home of the appellant where he had theretofore at all times resided. In 1903 the son was adjudged insane by the superior court of King county, and committed to the asylum for the insane where he still remains, and thereafter respondent Turner was appointed guardian of his estate. The present action was commenced on May 15, 1906, some three years after the son was adjudged insane.

Although this copartnership existed for a period of about twenty years before the son became insane, if it existed at all, yet there is not a particle of direct testimony tending to show the formation or existence of such a partnership. There is testimony tending to show that the mother advanced money for the original purchase of the business; that she took a general interest in the conduct of the business and superintended the smoking of fish; that she received no salary or wages for her services; that she drew considerable sums from the business for household expenses, and was authorized so to do, and that after the formation of the corporation such sums were charged to the personal account of the son. But all

these facts are just as consistent with the relation of mother and son as with that of copartnership, or even more so. The general statements of witnesses to the effect that the appellant had an interest in the business, or at least appeared to have, are entitled to but little weight in view of all the circumstances and the admitted relationship of the parties. Had this partnership existed for a period of twenty years we cannot escape the conclusion that some more definite trace of its existence could be found than is disclosed by this record.

The findings of the court below are in accordance with our own views of the testimony, and the judgment is therefore affirmed.

HADLEY, C. J., FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 6787. Decided October 8, 1907.]

FRANK B. CURTIN, *Respondent*, v. CLEAR LAKE LUMBER COMPANY, *Appellant*.[1]

APPEAL—REVIEW—WAIVER OF ERROR—TRIAL. Error in overruling a motion for a nonsuit is waived by proceeding with the trial and introducing evidence.

MASTER AND SERVANT—INJURIES—SAFE PLACE—WARNING—NEGLIGENCE OF FOREMAN. A master is liable for injuries received by a woodsman by being struck by a falling limb, where it appears that he was set to work by the foreman to saw down a tree, and while so engaged, the foreman, without giving the customary warning of a falling tree, fell another tree in the vicinity which broke off the limb falling on the plaintiff before he could seek a place of safety.

SAME—WARNING—EVIDENCE—QUESTION FOR JURY. Upon an issue as to whether a warning of danger was given to a servant, the question is for the jury where the evidence of two witnesses for the defendant that plaintiff had admitted a warning is flatly denied by the plaintiff, and there is a sharp conflict in the testimony.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It is harmless error to instruct that inferences should not be drawn because of the absence of material witnesses unless their whereabouts were

[1]Reported in 91 Pac. 956.

known to the parties and their presence could have been obtained, where it was made applicable to both parties and there was nothing to indicate that the witnesses were under the control of one party more than the other, or that one was more neglectful than the other, and no prejudice appears (RUDKIN and CROW, JJ., dissenting).

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered January 7, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee struck by a limb from a falling tree. Affirmed.

Kerr & McCord, for appellant.
Smith & Cole and *Robert H. Lindsay*, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries. The plaintiff was, at the time of the accident, in the employ of the defendant, and the latter, in the prosecution of its business, was then clearing a right of way and had its employees engaged at the place of the accident in cutting trees. The plaintiff was severely injured through being struck by a flying limb from a falling tree. He charges that the defendant was negligent in not giving him warning of the falling of the tree, so that he might have sought a place of safety and thus have protected himself. Negligence was denied by the defendant, and it alleged contributory negligence on the part of the plaintiff. The answer also alleged that the dangers were open and apparent, and that plaintiff assumed the risk of the danger. It was further averred that the injuries were due to the negligence of a fellow servant. The cause was tried before a jury, and a verdict was returned in the plaintiff's favor for the sum of $1,500. Judgment was entered upon the verdict, a new trial having been denied, and the defendant has appealed.

It is first assigned that the court erred in denying appellant's motion for nonsuit. But, as we have repeatedly held, any error in the denial of this motion was waived by appellant

when it proceeded to introduce testimony upon its own behalf and thereby elected not to stand upon its said motion. Thereafter the sufficiency of all the evidence to sustain a verdict for respondent must be considered, and not that offered by the respondent alone. The next assigned error, however, raises the sufficiency of all the evidence, it being contended that the court should have granted a new trial for lack of evidence sufficient to sustain the verdict.

The evidence showed that appellant's representative, who was especially delegated by it to superintend its work at that time and place, directed the respondent and another to proceed to cut down certain of the larger trees with a saw. While they were thus engaged, this foreman went to a place a short distance from them and began cutting a smaller tree with an ax. While respondent and his companion were still sawing upon their tree, the foreman's tree fell and, in its descent, it struck another tree, thereby causing a limb to be thrown, which injured the respondent. The evidence is all in practical accord as to the foregoing, and it is therefore evident that, if the foreman was negligent in such a manner as to proximately cause the injury, his neglect became that of his principal, the appellant. It was also practically conceded by all the witnesses that it is a general custom among woodsmen to shout "falling tree," or other equivalent words, when a tree is to fall, as a warning to others in the vicinity to look out for their safety, and that woodsmen in general expect to be protected by such warning. The respondent testified that no warning whatever was given, and that he had no notice of the falling of the tree until it struck the other tree, when it was too late for him to reach a place of safety. Two witnesses, one the superintendent of appellant and the other an employee, testified that respondent stated in their presence just after the surgeon had dressed his wounds, that the foreman did shout a warning. The respondent flatly denied that he made any such statement. There was thus a sharp conflict

in the testimony upon this material point, and neither the trial court nor this court should undertake to say, under the evidence in the record, what testimony the jury should have credited. The weight to be attached to the testimony of the several witnesses was for the jury to determine. Under the instructions of the court, the jury by the verdict must have found that respondent's testimony was true and that no warning was given. Such being an established fact in the case, it follows that appellant's negligence is also established, and that the verdict is thereby sustained.

A number of errors are assigned upon the court's refusal to give instructions in the form requested by appellant. We believe the instructions which the court gave covered fully and fairly every proper legal phase of the case, and that no prejudicial error was committed in the refusal to instruct in the language requested.

It is urged that the court erred in giving the following instruction:

"I instruct you, gentlemen of the jury, that you are not to draw any inferences from the absence of witnesses in this case, unless you should further find that the whereabouts of such witnesses were known to the parties in the case and that their presence could have been obtained or their evidence could have been obtained."

The appellant requested an instruction that no inferences could be drawn against appellant itself by reason of the absence of witnesses, but the instruction was modified by the court so as to apply to either party, and in addition thereto such words were used as may have left the jury to imply that, if they found as a fact that the whereabouts of witnesses were known to the parties and that their presence or evidence could have been obtained, then they might draw inferences from the absence of such witnesses. The statement of the court was made to apply as fully to one party as to the other. Nothing in the evidence showed that the absent witnesses were under the control of one party more than the other, or that

their whereabouts were any better known to one than to the other. For aught that appeared, it was as much within the power of respondent as of appellant to produce the witnesses or their testimony. We think, under any view of the law in the matter, that the instruction did not become prejudicial in its effect, as there was no evidence upon which the jury could predicate a finding that one party was more neglectful in this regard than the other, and the jury could not therefore draw inferences more strongly against one than the other. No authorities are cited by either party upon this point; but we are satisfied that, if there was any technical error in the instruction when considered as a whole, it was harmless for the reasons above stated.

The judgment is affirmed.

MOUNT and FULLERTON, JJ., concur.

ROOT and DUNBAR, JJ.—We think the instruction complained of erroneous but not prejudicial under the evidence and facts of this case. We concur in the result.

RUDKIN, J. (dissenting)—I dissent. As stated in the majority opinion, "Nothing in the evidence showed that the absent witnesses were under the control of one party more than the other, or that their whereabouts were any better known to one than to the other," and in such case there is no inference or presumption one way or the other.

In *Scovill v. Baldwin*, 27 Conn. 316, the court said:

"The circumstance that a particular person, who is equally within the control of both parties, is not called as a witness, is too often made the subject of comment before the jury. Such a fact lays no ground for any presumption against either party. If the witness could aid either party, such party would probably produce him. As he is not produced, the jury have no right to presume anything in respect to his knowledge of any facts in the case, because they are to try the case upon the facts shown in evidence, and upon them

alone, without attempting to guess at what might be shown if particular persons were produced by the parties."

To the same effect, see, *Haynes v. McRae*, 101 Ala. 318, 13 South. 270; *Crawford v. State*, 112 Ala. 1, 21 South. 214; *Nelms v. Steiner*, 113 Ala. 562, 22 South. 435; *Farmers' Bank v. Worthington*, 145 Mo. 91, 46 S. W. 745; *Diel v. Missouri Pacific R. Co.*, 37 Mo. App. 454; *Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108; *Daggett v. Champlain Mfg. Co.*, 72 Vt. 332, 47 Atl. 1081; 22 Am. & Eng. Ency. Law (2d ed.), p. 1262.

It surely cannot be said as a matter of law that a litigant must produce every witness who may know anything about his cause or incur the risk of having the court charge the jury that they may indulge in presumption against him for his failure in that regard. If the instruction complained of is erroneous, it calls for a reversal, unless this court can say, beyond peradventure, that no prejudice resulted therefrom; and the mere fact that the instruction was made applicable to both parties is not decisive on that question. The court below evidently concluded that one or the other of the parties failed to produce witnesses, else the instruction would not have been given, and if the court so concluded, why not the jury? Can it be said to a moral certainty that the jury did not conclude that the obligation to produce these witnesses rested upon the appellant, in whose employ they were at the time of the accident complained of? I am far from satisfied that such was not the case, and I therefore dissent.

CROW, J.—I concur in the foregoing dissent.

[No. 6754. Decided October 8, 1907.]

ISABELLE R. STEELE *et al.*, *Appellants*, v. JAY LAWYER *et al.*, *Respondents*, W. H. KIERNAN, *Defendant*.[1]

BROKERS—EMPLOYMENT—PRINCIPAL AND AGENT—RELATIONSHIP—EVIDENCE—SUFFICIENCY. Brokers are not shown to be the agents of the owners, although they accepted a commission, where it appears from the correspondence between them that the brokers, claiming to have a client desiring the property, first sought employment, and then an option, that the owners refused employment to them as agents on a commission basis, and refused them an option, but fixed their own price "net," and after much correspondence offers were made direct and accepted, which precluded any legal claim for a commission, although the owners did pay a commission and may not have been informed that the brokers were interested in the purchase, the brokers not having demanded the commission, and the parties having dealt at arm's length.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 7, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to rescind a sale of real property, and for an accounting. Affirmed.

Danson & Williams, and *Fred H. Moore*, for appellants.

Graves, Kizer & Graves, for respondents.

RUDKIN, J.—Some years ago the plaintiffs, who are residents of the state of Maryland, acquired by mortgage foreclosure a large tract of wild unplatted land in the northern part of the city of Spokane. The land thus acquired was rough and gravelly, covered with a growth of scrub pine, and fit only for townsite purposes. In the month of February, 1905, this land was sold to the defendant Lawyer Land Company. At the time of the sale, the streets in the vicinity of the land were ungraded, and the land itself was without water, light or street car service. Immediately after the sale

[1]Reported in 91 Pac. 958.

the land was platted into lots and blocks, the streets graded, a water supply secured, and light and street car facilities obtained, at a considerable cost to the purchaser. The lots were extensively advertised, and at the time of the commencement of this action, some eighteen months after the sale, the greater part of the property had been sold, and the purchaser was in a fair way to make a good profit on its investment. The present action was brought to rescind the sale above referred to, to recover the property unsold, and for an accounting of all sums received on account of sales made. This relief was sought upon the sole ground that the defendants Lawyer and Dalke, partners as the Western Trust & Investment Company, were the agents of the plaintiffs in negotiating the sale to the defendant Lawyer Land Company, and were also interested in the purchase as stockholders in the purchasing company, which latter fact was unknown to the plaintiffs at the time of the sale, or until a few days prior to the commencement of the action. The court below denied the relief prayed for, and the plaintiffs have appealed.

If the relation of principal and agent did not exist between the appellants and the respondent Western Trust & Investment Company, at or prior to the time of the sale which the appellants are now attempting to rescind, the judgment must of necessity be affirmed; and we will first address ourselves to a consideration of that question. If such relationship existed, it was created by or resulted from the written correspondence between the parties, as they never met or had other or further dealings. The negotiations leading up to the sale were conducted by the appellant Margaret A. Steele on the part of the appellants, and largely by the respondent Lawyer on the part of the Western Trust & Investment Company; but for convenience we will hereafter refer to the parties to the correspondence as the appellants and the Western Trust & Investment Company.

The first communication between the parties was the fol-

lowing letter from the Western Trust & Investment Company under date of September 30, 1903:

"We note that you are paying taxes on N. E. ¼ of S. E. ¼ of Sec. 6 T 25 R 43, . . . We have a party that desires to purchase 5 or 10 acres in that vicinity and hence we write you to ascertain your best cash price. . . . P. S. Make price including a 5 per cent. com."

The answer of appellants under date of October 6th was as follows:

"In reply to your letter of inquiry of the 30th ultimo I will say that it is not our desire to sell off the best part of our land . . . in such small parcels but we are offering the whole of the east forty in one lot. Messrs. H. Bolster & Co. of your city have the matter in charge at present and will be glad to answer inquiries."

Under date of May 12, 1904, the appellants wrote:

"Last October I received a letter of inquiry from your firm in regard to some land my sister and I own north of Spokane. At that time a client of yours wished to buy 5 or 10 acres. . . . I write to say that the land is now for sale but not in quite such small portions as you asked for last year. . . . If at present you have a client wanting such land I shall be glad to hear from you."

This letter was answered under date of September 26th as follows:

"On May 12th, you wrote us regarding the N. ½ of the S. ½ of Sec. 6. . . . We have been doing some work on this proposition and now have a party interested in the proposition and think we can make a sale. Before going more fully into the matter with our client we would like to have a letter from you giving us the exclusive sale for, say sixty days, and stating that a commission of 5 per cent. will be allowed us for making the sale. If you will give this matter your prompt attention we have every reason to believe that we can make the deal for you in a very short time."

On October 1st the appellants replied as follows:

"Your letter of the 26th ultimo is at hand, and in reply say that I have already sold the east 40 acres of the tract to which you refer . . . and have given an option on

the remainder. If the present option should fail of results, and if another party who seems anxious to buy in case the remainder of the land is again on the market, should fail to purchase, I will let you know."

On November 23d the Western Trust & Investment Company again wrote:

"You wrote us on Oct. 1st that you would soon know whether or not you would be in a position to place vacant property north of the city in Sec. 6-25-43. We have a party whom we think we could interest providing we could get an option."

The above was answered by the appellants under date of November 30th, as follows:

"In reply to your letter of the 23d inst. I will say that 110 acres of our land in section 6 remain on the market. The price is $245 per acre. . . . I am not in a position to give an option to anyone now and do not expect to give one at all unless it be for a very short time to close a deal that has been previously arranged. If you can do anything for me on these terms I shall be glad to hear from you. . . . The price I now quoted ($245 per acre) is for all cash or half cash and the rest first mortgage on the land."

On December 5th the Western Trust & Investment Company again wrote:

"In reply to yours of the third [should be thirtieth] ult. will say that we have parties who will buy your 110 acres in Sec. 6 provided you will make some small concessions from terms as stated in your letter. You offered us the entire 150 acres in May last at $200 per acre; since then you have sold the best 40 acres and now ask $245 for the remainder. This is more of an advance than conditions will warrant but to cut it short our people will pay you $25,000 net for the property but will require a little time to get the money together. . . . We can assure you that is a very liberal offer for the property and feel sure that you can not do better. . ."

To which the appellants replied under date of December 12th:

". . . The figures I have given you are the best we can do on the land. In regard to the sixty days for pay-

ment, we could not give so much unless a considerable sum was paid down as an evidence of good faith. Otherwise your proposition would amount to option of sixty days, which we are not prepared to give. I shall be glad to hear further from you if your clients can agree to our terms."

On December 28th the Western Trust & Investment Company wired:

"Will you give us to Jany twentieth to close land deal at your price? Wire answer."

On December 30th the appellants answered by wire:

"I will give until Jany twentieth to close deal."

The following day the appellants wrote:

"If you have prospect of completing your deal by the time set, January 20th, the deed should be placed in escrow without delay. If you will send me a blank form for deed immediately on receipt of this and will tell me in whose name to draw it, . . . I presume that you intend to pay the whole in cash."

This letter was answered by the Western Trust & Investment Company under date of January 6, 1905, as follows:

"In reply to yours of Dec. 31st will say that we will have the money in the bank to close deal on or before the 20th but cannot yet advise you how to make the deed for the reason that our clients have not yet decided whether they will hold title to the property as a corporation or have it deeded to some one person. . . . There is no doubt about our people taking the property. . . ."

On January the 13th the appellants wrote:

"Yours of the 6th inst. at hand. I have just written Messrs. Crow & Williams giving them directions about drawing of the mortgage in case you make half payment in that way. . . Your clients will soon have to make up their minds on the points you mentioned if they want the deed in bank by the 20th instant."

On January 20th the Western Trust & Investment Company applied for an extension of time in the following letter:

"We regret very much to have to inform you that we have not been able to close deal on your land. We have put in a lot of hard work on this proposition and have $13,000 on hand to put into the deal but other parties interested have been slow in reaching a decision and in getting their money. However we feel certain that if we have a little more time we can close the deal for cash. Our Mr. Lawyer has just had a full discussion of the matter with Messrs. Crow & Williams and they are writing to you today. We trust that you will understand our position and give us an extension of two or three weeks. . . . Upon receipt of this letter please wire at our expense the best you are willing to do for us and unless there is some good reason for your not doing so we trust you will grant us the full three weeks, we will in turn guarantee to do our best to close the sale in that time and hope to do it before."

This was accompanied by a letter from the appellants' attorneys recommending the extension, if it did not interfere with other plans. On January 26th the appellants granted the extension by the following telegram:

"Extend option three weeks from January twentieth. Afterward higher price."

On February 6th a deed was forwarded to the appellants for execution by their attorneys, with the name of the grantee in blank, the attorneys informing them in the letter of transmittal that the grantee was a corporation to be formed for the purpose of handling the property. A postscript was later added to the letter saying that the name of the grantee corporation was Lawyer Land Co., and that the name had been inserted in the deed. On February 7 the Western Trust & Investment Company wired:

"Have closed deal. Williams sending deed to you today."

And the next day wrote as follows:

"We are pleased to inform you that we have at last concluded arrangements for the purchase of your property, and deed was forwarded to you yesterday by Mr. Williams of

Crow & Williams. We hand you herewith the opinion of our attorney on the title, which shows the taxes for 1904 unpaid; also some old city taxes, both of which you can arrange to have paid out of the purchase price. Also in your instructions to the bank please mention that the cost of the abstract, $18, is to be allowed. . . ."

The remainder of the letter relates to a deficiency in the acreage and is not material. This letter and telegram the appellants answered under date of February 14, as follows:

"Your letter of the 8th inst. enclosing the opinion of your attorneys reached me this morning. Last night I received a letter from Mr. Williams enclosing the deed for our signatures. You doubtless remember that when I offered you the land at $245 per acre the year was still 1904 and so the taxes were not due. They will not become delinquent, as you are aware, until the 31st of May next. . . In offering the land to you I figured 110 acres at $245—or $26,950 as you have stated in the deed, allowing you 5 per cent. commission and no deductions except the amount of the abstract. If you are willing to give this amount the deed will be forwarded to the Traders National Bank. If you do not wish to pay so much there is no compulsion upon you to take it. I am willing to risk holding it for a higher price. . . ."

The instructions to the appellants' bankers relating to the delivery of the deed were as follows:

"The enclosed deed is to be delivered to Mr. Jay Lawyer of the Western Trust & Investment Co. Jamison Blk, Spokane, on the following conditions:

"He is to pay $26,950 (as mentioned in deed) less 5 per cent. commission and less also $18 for abstract. That is he is to pay a net sum of $25,584.50. Besides he is to show you tax receipts for 1904 taxes. . . . Mr. Lawyer understood that this is the condition, we having refused to reduce our purchase price by these amounts. . . ."

Other brief communications between the parties have no bearing on the question under consideration. Did the foregoing correspondence create an agency between the appellants and the Western Trust & Investment Company? It

may be that the application to extend the time for consummating the sale was made in bad faith, to permit the lien for 1904 taxes to attach; the Western Trust & Investment Company may have accepted and retained a commission they were not entitled to either as a matter of contract or as a matter of law, and the subsequent attempt to recover back a part of the purchase price on account of a deficiency in the acreage may have been unwarranted, but the question here is one of agency, not of honesty or fair dealing.

In the first letters that passed between the parties the Western Trust & Investment Company undoubtedly sought employment as agents for the appellants, and expressly referred to their commission of 5 per cent, but they never were appointed or recognized as agents, and on October 1st, 1904, were informed that forty acres of the land had already been sold, and that an option had been given for the remainder. The negotiations which culminated in the sale to the Lawyer Land Company commenced with the letter of November 23, 1904, wherein the Western Trust & Investment Company wrote that they had a party in view whom they thought they could interest in the property, "Providing we could get an option." Whether the option was to run to the Western Trust & Investment Company or to the intending purchaser is a matter open to conjecture. The appellants replied to this, fixing their price at $245 per acre, refusing the option, and adding, "If you can do anything for me on these terms I shall be glad to hear from you." This expression, and the subsequent acceptance of a commission by the Western Trust & Investment Company are the only facts or circumstances in the record tending in the remotest way to substantiate the claim of agency. The matter of the commission we will refer to later. In their letter of December 5, the Western Trust & Investment Company said: "To cut it short our people will pay you $25,000 *net* for the property." This offer would seem to preclude a claim for commission or a claim of agency,

and the reply of the appellants that $245 per acre already fixed was the best they could do, should also be construed as a net offer. In fact the entire correspondence shows that the appellants and the Western Trust & Investment Company were dealing at arm's length, and that the latter represented the purchaser, if anybody. Thus, in their letter of February 14, 1905, the appellants say to the respondent Lawyer: "If you do not wish to pay so much there is no compulsion upon you to take it. We are willing to risk holding it for a higher price." In their letter to their bankers they say, "The enclosed deed is to be delivered to Mr. Jay Lawyer of the Western Trust & Investment Company, Jamison Blk., Spokane, on the following conditions: He is to pay $26,950 (as mentioned in deed) less 5 per cent commission and less also $18 for abstract. That he is to pay a net sum of $25,584.50. Besides he is to show you tax receipt for 1904 taxes. Mr. Lawyer understood that this is the condition, we having refused to reduce our purchase price by these amounts."

Now as to the acceptance of the commission on the sale by the Western Trust & Investment Company. In the first place, they were clearly not entitled to a commission as a matter of law, because of their interest in the purchase. In the second place, in our opinion they were not entitled to a commission as a matter of contract; and while their subsequent conduct in accepting a commission is in a measure inconsistent with their statement that they expected none, yet we think that statement is fully borne out by the testimony. In their letter transmitting the opinion of their attorney on the abstract they referred to the taxes of 1904, the old city taxes, the cost of the abstract, and the claim on account of a deficiency in acreage, but made no reference to a commission and no provision whatever was made for its payment. From all the circumstances therefore we are constrained to hold that the Western Trust & Investment Company were not entitled to a commission as a matter of law or contract and expected none.

Its subsequent acceptance is a circumstance against them; but an agency existed or did not exist pending the negotiations for the sale, and could neither be created nor abrogated by what subsequently transpired.

"Agency is a legal relation, founded upon the express or implied contract of the parties, or created by law, by virtue of which one party—the agent—is employed and authorized to represent and act for the other—the principal—in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority." Mechem, Agency, § 1.

We fail to see a single element of such relationship in the record before us. The Western Trust & Investment Company may not have informed the appellants in so many words that they were interested in the purchase, and the appellants may not have known of such interest to a moral certainty; but their suspicions were aroused, and they made no inquiry, for the all sufficient reason that at that time they did not care. The appellants concede that loose expressions in the correspondence militate against their present claims, and we can find nothing but loose expressions in their favor. Ordinarily a court of equity will not seize upon mere loose expressions for the sole purpose of enabling parties to reap where they have not sown.

There is no error in the record, and the judgment is affirmed.

HADLEY, C. J., FULLERTON, DUNBAR, and ROOT, JJ., concur.

CROW, J., took no part.

[No. 6665. Decided October 8, 1907.]

EDWARD SPENCER, *Appellant*, v. A. FRANK KEES, *Superintendent of the State Penitentiary, Respondent*.[1]

PARDONS—CONDITIONS — AUTHORITY OF GOVERNOR — REVOCATION—STATUTES—CONSTRUCTION. Under Bal. Code, § 6997, authorizing conditional pardons to be granted by the governor, on such limitations as he may think proper, the provision that he may "issue his warrant to carry into effect such pardon," is not limited to the issuance of the warrant granting the pardon, but reposes power in the governor to issue a warrant revoking a pardon which expressly provides that violation of its conditions shall cause its revocation, in the absence of any other statutory provision for determining when the conditions are violated.

SAME—HABEAS CORPUS—MODE OF TRIAL. If a prisoner, rearrested after release on a conditional pardon, is entitled to trial in *habeas corpus* proceedings to determine whether he has violated the conditions of the pardon, he cannot complain if he is awarded a trial before the court and the burden of proof is placed on the state.

SAME—BREACH OF CONDITIONS—EVIDENCE—SUFFICIENCY. A prisoner who is pardoned upon condition that he should be placed under the care and surveillance of Dr. B., and that he should remain with and be supported by his relatives as long as he lives, is shown to have violated the conditions of the pardon where he remained with his relatives only a few days, was permitted to support himself, was married, visited houses of prostitution and frequently became intoxicated (RUDKIN, DUNBAR, and FULLERTON, JJ., dissenting).

Appeal from an order of the superior court for Walla Walla county, Brents, J., entered June 27, 1906, refusing to discharge a prisoner on habeas corpus proceedings. Affirmed.

John H. Pedigo and *Garrecht & Dunphy*, for appellant.

The Attorney General and *E. C. Macdonald*, *Assistant*, *Otto W. Rupp*, and *Lester F. Wilson*, for respondent.

[1]Reported in 91 Pac. 963.

MOUNT, J.—This appeal is from an order in *habeas corpus*, refusing to discharge the appellant from prison. On June 4, 1903, the appellant, having been convicted of murder in the second degree, was sentenced by the superior court for Spokane county to imprisonment in the penitentiary for the term of thirteen years. He was thereupon incarcerated in the penitentiary. On May 8, 1905, the governor granted a conditional pardon which, after reciting the facts above stated, is as follows:

"Whereas, it has been represented to me by Dr. Yancy C. Blalock, physician at the said penitentiary, that the said Edward Spencer is an invalid, is failing in health, and cannot live, which statement is endorsed by Hon. Jesse T. Mills, chairman of the state board of control, who also recommends the granting of executive clemency to the said Edward Spencer;

"Now, therefore, I, Albert E. Mead, governor of the state of Washington, by virtue of the authority in me vested, do hereby pardon the said Edward Spencer, on the condition and understanding that he be placed immediately under the care and surveillance of Dr. Yancy C. Blalock, who shall report immediately to the governor any violation of the conditions on which this pardon is granted, and on further condition that the relatives of the said Edward Spencer provide for and support him so long as he shall live, and that failure on their part so to do, or on the part of the said Edward Spencer to remain with them and under the surveillance of the said Dr. Yancy C. Blalock, shall cause the revocation of this pardon and the recommitment of the said Edward Spencer to the penitentiary to serve out the remainder of his term according to the sentence imposed on him by the court hereinbefore mentioned.

"And I hereby authorize the superintendent of the penitentiary to liberate the said Edward Spencer on the conditions named herein."

The terms and conditions of this pardon were accepted by Spencer, and, in pursuance thereof, he was released from the penitentiary on May 14, 1905. Thereafter, on May 16, 1906,

the governor revoked the conditional pardon by issuing under his hand and the seal of state his declaration as follows:

"To all to whom these presents shall come, Greeting:

"Whereas, on the eighth day of May, 1905, a conditional pardon was granted to Edward Spencer, a prisoner in the state penitentiary, on representations made to the governor that the said Edward Spencer was an invalid in an advanced stage of consumption, who could live but a short time; that his friends and relatives living in the county of Walla Walla stood ready to receive and care for him, and that his condition was such that it would be but an act of common humanity to permit him to leave the prison so that he might die outside of its walls; and

"Whereas, the conditions of the said conditional pardon as set forth therein were as follows, to wit: 'That he (the said Edward Spencer) be placed immediately under the care and surveillance of Dr. Yancy C. Blalock, who shall report immediately to the governor any violation of the conditions on which this pardon is granted, and on the further condition that the relatives of the said Edward Spencer provide for and support him so long as he shall live, and that failure on their part so to do, or on the part of the said Edward Spencer to remain with them and under the surveillance of the said Dr. Yancy C. Blalock shall cause the revocation of this pardon and the recommitment of the said Edward Spencer to the penitentiary to serve out the remainder of his term according to the sentence imposed on him by the court hereinbefore mentioned;' and

"Whereas, the said Edward Spencer has violated each and every one of the above mentioned conditions, thereby rendering the conditional pardon null and void:

"Now, therefore, I, Albert E. Mead, governor of the state of Washington, by virtue of the authority in me vested, do hereby revoke and cancel the conditional pardon granted to the said Edward Spencer, and by these presents do order and direct the superintendent of the state penitentiary to apprehend the said Edward Spencer and return him forthwith to the state penitentiary to serve out the remainder of his term according to the sentence imposed on him by the judge of the superior court of the state of Washington in and for the county of Spokane, on the 4th day of June, 1903."

In pursuance of this revocation of pardon, the superintendent of the penitentiary apprehended the appellant and imprisoned him in the penitentiary. Appellant thereupon applied to the superior court for Walla Walla county for a writ of *habeas corpus*, alleging his original conviction and sentence and the conditional pardon as above stated, and his release thereunder; that he had complied with all the terms thereof, and that the respondent wrongfully and without authority detains the appellant in custody. The writ was issued and, for a return thereto, the respondent alleged the revocation of the conditional pardon, for the reason that all the conditions thereof had been violated; and also alleged that the pardon was void because it was obtained by fraudulent representations. Appellant moved to strike out of the return the allegations relating to the violation of the conditions of the pardon and the allegations of fraud. This motion was overruled by the court. Appellant then denied the allegations of the return and, upon these issues, the cause was tried to the court without a jury, appellant's demand for a jury being denied. The court ruled that the burden of proof was upon the state to show that appellant had violated the terms of the pardon. After hearing the evidence the court, without making any findings of fact, denied the application for discharge, and remanded the appellant to the custody of the superintendent of the penitentiary to serve out his original sentence. This appeal is prosecuted from that order.

It is argued by counsel for appellant that the court erred in refusing to strike out the allegations in the return to the writ, to the effect that the conditions of the pardon had been violated and that the pardon was procured by fraud, for the reason that questions of this character cannot be tried on an application for *habeas corpus*. This raises the question whether the governor was authorized to issue his warrant declaring the conditional pardon void and ordering the appellant to be again taken into custody without giving the appel-

lant an opportunity to be heard. The constitution, at § 9, art. 3, vests the pardoning power in the governor "under such regulations and restrictions as may be prescribed by law." Bal. Code, § 6997 (P. C. § 2257), provides that, in all cases in which the governor is authorized to grant pardons, he may grant a pardon under such conditions and with such restrictions and under such limitations as he may think proper, "and he may issue his warrant to all proper officers to carry into effect such pardon or commutation, which warrant shall be obeyed and executed instead of the sentence, if any, which was originally given." No other regulations or restrictions have been prescribed by law, and no other method has been provided for determining when the conditions of a pardon have been broken.

The appellant insists that the provision that the governor may issue his warrant to carry such pardon into effect refers only to the manner of release, and was not intended to provide a method of revocation. There would be much force in this contention if other provisions had been made for determining when conditional pardons have been violated, but there are none. We are of the opinion, therefore, that the provision above stated reposes power in the governor, not only to effect the release, but to make conditional pardons effective. There can be no doubt that the governor was authorized to grant the pardon upon the conditions named, or any others which were capable of being performed and which were not illegal or immoral, and when the appellant accepted the conditional pardon as given he was bound by all its provisions. If the pardon had been unconditional, the release under it would have been final and the governor and the courts would have been without power to again enforce imprisonment under the original sentence. But this was a conditional pardon, such as the governor had power to impose. He granted it as a matter of grace and not of duty. He did not intend to completely exonerate the appellant or to release him from the force and

effect of the sentence, but expressly provided that a failure to comply with the conditions "shall cause the revocation of this pardon and the recommitment of the said Edward Spencer to the penitentiary to serve out the remainder of his term according to the sentence." This language manifests a plain intention on the part of the governor to himself maintain control over the pardon and to revoke the same upon failure of the conditions. If the provision that the governor may issue his warrant to carry the pardon into effect refers only to the release of the convict, as contended by the appellant, then the control of a conditional pardon passes from the governor immediately upon release of the prisoner. We think such result was not intended by the language used. This result, of course, follows from unconditional pardons, because in such case the release is conclusive; there is no more to be done. But in case of a conditional pardon the enforcement of the conditions is carrying the pardon into effect, as much so as the release. We are, therefore, of the opinion that the governor had power to enforce the performance of the conditions, and when he became satisfied that the conditions of the pardon were being violated, he was authorized to issue his warrant revoking the pardon under the express terms of the pardon and under the statute.

In *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047, the court said:

"As we have already said, the governor had authority to grant the parole, but as he did it as a matter of grace, and not as a duty, it was his right to impose such conditions as he saw proper, and when the appellant accepted it he, by implication, as well as agreement, did so subject to all of its terms and conditions. We have examined the following authorities cited by the attorney general, and find them pertinent; *Ex Parte Wells*, 18 How. 307; *United States v. Wilson*, 7 Pet. 149; cases cited on page 481 of 6 Crim. Law Mag.; *State v. Smith*, 1 Bailey Law (S. C.) 283, 19 Am. Dec. 679; *Ex Parte Lockhart*, 1 Disney (Ohio) 105; *State v. Fuller*, 1 McCord (S. C.) 178; *Flavell's Case*, 8 Watts & S. 197;

Arthur v. Craig, 48 Iowa 264. Under the circumstances the appellant was at large merely at the will of the governor. The governor had it in his power to order the appellant to prison at any time."

See, also, *Turner v. Wilson*, 49 Ind. 581; *Kennedy's Case*, 135 Mass. 48; *Ex Parte Marks*, 64 Cal. 29, 28 Pac. 109, 49 Am. Rep. 684; *Ex Parte Hawkins*, 61 Ark. 321, 33 S. W. 106, 54 Am. St. 209; *Commonwealth v. Halloway*, 44 Pa. St. 210, 84 Am. Dec. 431.

If the appellant was entitled to a trial upon the allegation that he had violated the conditions of the pardon, the court granted that right to him in this proceeding and placed the burden upon the state to show that appellant had violated the terms of the pardon. It has been held that this may be done in cases of this kind. *Ex Parte Brady*, 70 Ark. 376, 68 S. W. 34; *Alvarez v. State*, 50 Fla. 24, 39 South. 481, 111 Am. St. 102; 6 Current Law 876.

Appellant also alleges that the court erred in receiving certain evidence. The cause is heard *de novo* here upon the facts, and we shall therefore not consider evidence which we think is not proper. We find no evidence that the pardon was obtained by fraud. But we are satisfied that the judgment of the court is supported by reason of the breach of the conditions of the pardon. The conditions were, that the appellant should be placed under the care and surveillance of Dr. Blalock; that his relatives should provide for and support him so long as he should live, and that appellant should remain with his relatives. The evidence conclusively shows that appellant did not remain with his relatives more than two or three days, and that appellant's relatives neither provided for him nor supported him; but that appellant was permitted to support and provide for himself, and was married, shortly before his arrest by order of the governor. The evidence also shows that he frequented houses of prostitution and saloons and often became intoxicated. It is true the evidence of these last-named facts was objected to, but we think they served

to show that appellant was not under the surveillance of Dr. Blalock. We think the trial court upon these facts properly found that the conditions of the pardon had been violated.

The order refusing a discharge was therefore correct, and is affirmed.

HADLEY, C. J., CROW, and ROOT, JJ., concur.

RUDKIN, DUNBAR, and FULLERTON, JJ. (dissenting)—We are of opinion that the respondent failed to show any violation of the conditions upon which the pardon was granted, and therefore dissent.

[No. 6557. Decided October 10, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. JOSEPHINE BARUTH, *Appellant*.[1]

CRIMINAL LAW—DECLARATIONS IN PRESENCE OF ACCUSED—ADMISSIONS. *Ante mortem* statements of deceased relating to the issues, made in the presence of the accused, are admissible, where she was at home in another room with the door open within easy hearing, and were made under such circumstances that she would without doubt have replied thereto if she did not wish to acquiesce therein; but statements made after the door between the rooms was closed, while the accused was engaged in conversation, although she might have heard and denied the same, are not made in her presence or under circumstances calling for a reply.

SAME—RELEVANCY. *Ante mortem* statements of deceased, made in the presence of the accused, are admissible only so far as they relate to the shooting from which death resulted, its immediate cause, and the conduct of the parties at the time which was part of the *res gestae;* and statements of conduct at other times, or irrelevant to the issue, are inadmissible.

HOMICIDE—CAUSE OF DEATH—NEGLECT OF PHYSICIAN—DEFENSES. The fact that wounds inflicted by shooting were not skillfully treated or accorded the best medical treatment is no defense to a prosecution for homicide where it is not shown that neglect or unskillfulness was the sole cause of the death.

[1]Reported in 91 Pac. 977.

CRIMINAL LAW—APPEAL—FAILURE TO REQUEST INSTRUCTION. In a prosecution for homicide, the failure to caution the jury as to admissions by the accused by acquiescence in an *ante mortem* statement made in her presence is not reversible error where no request was made for such instruction.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 21, 1906, upon a trial and conviction of manslaughter. Reversed.

M. J. Gordon and *Sullivan, Nuzum & Nuzum*, for appellant.

R. M. Barnhart, Fred C. Pugh, and *A. J. Laughon*, for respondent.

FULLERTON, J.—On March 26, 1906, the appellant shot one C. L. Baruth with a revolver, inflicting upon his person certain wounds, from which he died four days later. Thereafter she was informed against for murder in the second degree, tried and found guilty of manslaughter, and sentenced to imprisonment in the penitentiary for a term of ten years and to pay a fine of $1,000. From the judgment and sentence pronounced upon her, she appeals.

The assignments of error relate chiefly to the admission and exclusion of evidence, and the giving of certain instructions and failing to give certain others. These we will notice in the order they are discussed in the appellant's brief. The state sought to prove the manner in which the crime was committed by showing the declarations of C. L. Baruth, made to certain of his neighbors on the evening of the day the shooting occurred. To that end it called as a witness one W. E. Connelly. Mr. Connelly, after testifying to his acquaintance with the deceased and certain preliminary matters, further testified that he, in company with one Charles Steele, called at the Baruth home about half past seven in the evening of the day of the shooting; that Mr. Baruth was then lying on a couch in the front room of the house talking to a Mr. Le-

Fevre, who had also called upon him; that Mrs. Baruth was not then at home; that Mr. LeFevre stayed for about half an hour after the witness and Steele arrived, leaving just about the time Mrs. Baruth returned; that after the departure of LeFevre, Mr. Baruth arose from the couch and took the chair vacated by him; that Mr. Steele sat next to him, and the witness sat on the opposite side of the same room; that Mrs. Baruth took a seat at a table in an adjoining room—the kitchen—placed just to the right of the door opening between the rooms, in sight of the witness, the door between the rooms being open; and that while the parties were in these positions Mr. Baruth told the story of the shooting. This story the witness repeated, over the objection of the appellant, in the following language:

"A. Mr. Baruth started it by saying 'This is the first time that I ever revealed a secret regarding my family or spoke to any man in Medical Lake or any where else of this trouble about my family in any way and I defy any man to say so, but this is getting to a point where I will have to talk I guess' and he went on to say that when he got home Sunday evening he came in the house he said and laid down on the sofa and picked up a paper and his wife came in and said 'Where have you been today,'— [Objection by defendant.] The Court: This is a statement the deceased made? The Witness: Yes, sir. The Court: Proceed. A. (Continued) He said 'She asked me where I had been and I made no reply, I laid there and went ahead reading just as though she wasn't talking; she next called me a few vile names and by and by went off and left me and at night I retired.' The next morning she comes in again and fetched in a coat and spread it down and she says 'Here is some mud on this coat; that proves the statement I made last night to you and here is also a hair and it is not mine either' at the same time pulling a hair off and showing it to him. She says 'This is not my hair either.' He said he still made no reply but laid there until she retired to the kitchen and went on about getting breakfast again and she commenced to tell the children what kind of a man he was and he says 'This much I couldn't stand' and he jumps up out of bed and grabs his pants and went through into the

kitchen door and says— Q. Indicate. A. Here is where he was. He came through these two doors this time, this door and this door, and he asked her, repeating the words he used 'What in hell and damnation is the matter with you' he says; those are the very words he said to her; she retired through this door and out into this bed room here and through this way and got a revolver and returned and began shooting at him and he claimed when she returned to the room where he was standing he was stooped over ready to put on his pants; he had his pants in his hand when she fired the first shot which struck him here (indicating). He grabs a chair up that sat here and held it up between him and her and he says she was shooting very rapid and he held the chair up between them and backed into this room through this door and just as he got the door closed, he stood at the side of the door here and he looks around and she stands here at this window right by the side of him with the gun looking up through the window; he retreats back and he says 'For God's sake don't shoot me any more; you have shot me now. That there is where Mrs. Baruth says 'You ought to have stopped when I told you. Q. She said that at that point? Did he say that she said that? A. Yes, he said that she said that he ought to have stopped when she told him, so he retires to this room again and sat down and sends for McCorkle, sends the little girl over to McCorkles and McCorkle came over and went for a doctor. Q. Do I understand that Mrs. Baruth stated to Mr. Baruth that then is when he ought to have stopped? A. Mrs. Baruth said to Mr. Baruth he ought to have stopped when she told him to. The Court: Did she interrupt his statement to you, when he was making that statement? The Witness: She just says,— The Court: While he was telling you that? A. When he was telling me that she says 'he ought to have stopped when she said so. Q. I don't understand the statement and I don't think the jury does. You say he stated, Mr. Baruth stated, that she said he ought to have stopped? A. She says when Baruth says that, she says to Steele right there,—she turns to Steele and says 'He ought to have stopped when I told him to.' Q. Proceed with any further conversation that you heard there or which was had, either by the defendant or Mr. Baruth in her presence. A. He said he sent for Mr. McCorkle to come over and he came and he sent him for the doctors. Q. During that con-

versation did he tell you how many times he was hit during the shooting? A. No, sir, he didn't say—yes, he said when he went in he was shot twice. Q. I mean at this conversation? Do you recall anything further of the conversation that passed between you and Mr. Baruth in the presence of the defendant or that was said by the defendant at that time? A. Mr. Steele he gets up and goes into the room and talks with Mrs. Baruth and Mr. Baruth and I sat there and talked for probably half an hour that he was in there. Q. During this conversation just him and you there alone? A. What I have stated was heard by all. Q. When Mr. Steele went into the kitchen where Mrs. Baruth was do you know whether or not the door was closed after him. A. When he went into the kitchen he closed the door behind him, yes sir. Q. Did you from where you were sitting hear any conversation between Mr. Steele and Mrs. Baruth with respect to the shooting? A. I did not. Q. And the subsequent conversation with the deceased on that night was not in the presence of the defendant? A. The remainder was between Baruth and I alone. Q. In that conversation did Mr. Baruth repeat the names which he said his wife called him? A. Yes, sir. Q. What did he say they were, Mr. Connelly? [Objection by defendant. Overruled. Exception.] Q. If you recall what those names were, state them? A. Well he said she called him a pimp and a whore master and that he was chasing women all the time and a few other vile names, I couldn't say exactly what he did say. He says 'This was a common occurrence when I came home' and that he paid no attention to it, when he came home and dressed up—he said 'Always when I went away from home dressed up, put on a white shirt and went down town and came home, there was always trouble."

Mr. Steele was also called as a witness. He described the situation pretty much as it was described by the preceding witness, probably placing Mrs. Baruth a little closer to the open door than she was placed by Mr. Connelly, and adding that the place where she sat was about ten feet distant from the position of Mr. Baruth. The record then shows the following:

"Q. Proceed, Mr. Steele, and relate to the jury as near as you can recall what was said and done during the conversa-

tion that has been referred to at the time and place referred to, and when the parties were maintaining toward each other the relative positions that you have described, touching the shooting and circumstances that led up to and surrounded the shooting? Mr. Swanson: We object for the reason it has not been shown the defendant would have heard the statement made at the time, but as in fact the circumstances show that she would not be apt to have heard it; he says that the way they were sitting it must have been about ten feet, and from the relative positions shown by the map the voice would have to travel first in an easterly direction then west to this door, and the circumstances show that this defendant could not very well have heard it, and I think anything as questionable as that ought not to be allowed to go in here; the statement was self serving, not a dying declaration and not a part of the *res gestae*. The Court: Objection overruled. Exception. Q. Proceed, Mr. Steele. A. You want the story related? Q. I want the story related at that time and place and any interruptions or suggestions that may have come from Mrs. Baruth or any question or statement that you or Mr. Connelly or any one else present made in the presence and hearing of Mrs. Baruth respecting this matter, the substance of it as near as you recall. A. When he started to tell his story he started out by saying 'This is the most contemptible piece of humanity that God Almighty ever put the breath of life in.' Then he says 'This all comes from my putting on a white shirt and going down town Saturday evening.' He says 'When I was going to lodge I put on a white shirt and I goes down to lodge and she makes a great kick before I started' and he says 'Sunday morning I got up and put on my collar and wore my white shirt down town on Sunday'—this was the day before the shooting, and he said 'There was always a kick whenever he put on a white shirt and went out' so he says 'I never before have revealed any secret or any trouble that ever happened in my family' and he went on to tell about when he came home the night before, on Sunday evening; he laid down on the lounge and she came around and was accusing him of being with other women, and she called him violent names and he said he said nothing but went to bed and the next morning she came in and was examining his clothes; he said she took his underclothes and turned them wrong side out and examined them all over; she examined them all through to see

if she could find some hair or anything, and then took his overcoat; it had mud on it and she spread that out and showed him, showed him where he had had his overcoat down in the mud and he said that he didn't say anything to her and she went on calling him names.— Q. Did he repeat the names that he claimed she called him? A. No, I don't remember— Q. Proceed. A. (Continued) So she comes out in the kitchen and commenced telling the little children a lot of stuff that wasn't for little children to hear and it made him angry so he says he jumped out of bed and went out and asked her what in the hell and damnation she was doing and he says she run around and went through the kitchen door and run around the house; he proceeded to put on his pants and while he was putting them on she came running in and fired at him so he says he retreated back in the bed room as fast as possible and as he was going he picked up a chair to shield the bullets away; after he went into the bed room he said he looked out of the window and she had gone around there looking through the window and if I remember right he said she shot through the wall or door or something from the outside and so he said he retreated back further in the other bed room or back the other way where she couldn't get at him, and I guess that is the most of his story. Q. How many shots hit him? A. He said she hit him twice; he said several shots were fired but only two hit him. Q. Do you recall anything further said at that time and place while you were sitting in the relative positions suggested before by you, either by the deceased or by the defendant, Mrs. Baruth, touching upon the shooting? A. He said that at one time he was worth ten thousand dollars and she broke him up until he didn't have a dollar and that she was always continually telling stories outside to people trying to make him out an awful man and such as that. I don't remember anything more just now. Q. Did he go into any particulars and tell you—do you remember what this woman was saying to the children which angered him? A. He said that she was telling the children about him being with other women; he didn't come out and say the words that she used at all; said that she was telling them what a bad man he was and how he had been out with other women. Q. During the statement which he then and there made, do you recall any interruption or any statement that Mrs. Baruth herself made,

or any response or any denials or any statement whatever that she made? A. Not right at that time, no sir. Q. Did she make any statement or response whatever during that time or until later when you and she were alone? A. No. Q. Were any persons in the house other than the children, Mr. and Mrs. Baruth, yourself and Mr. Connelly at the time this statement was being made? A. If there was, I didn't see them; I was only in the two rooms, the kitchen and the sitting room. Q. You knew nothing about the other rooms, the bed rooms? A. No, sir. Q. Afterwards at any time during the evening, did you have any other conversation, did you have any conversation with Mrs. Baruth herself? A. I did. Q. About how long was it after this talk you heard from Mr. Baruth? A. Probably ten or fifteen minutes. Q. Where did you have that conversation? A. In the kitchen. Q. Were any other persons present beside yourself and Mrs. Baruth? A. No, sir. Q. Where was Mr. Baruth and Mr. Connelly? A. They were in the sitting room. Q. Was or was not the door leading from the kitchen to the sitting room open while this conversation was going on with Mrs. Baruth? A. No, I closed it when I went out. . . . In the meantime while me and Mrs. Baruth was talking, Mr. Connelly and Mr. Baruth in the other room, every time they would say anything we could hear them distinctly— Q. Was the door closed? A. With the door closed, yes, sir; and no matter whether we was busily engaged in the subject or not Mrs. Baruth would stop and listen whenever Mr. Baruth would speak, and of course if it didn't amount to anything pertaining to this incident she would go ahead then with her story with me, but if it was about her, relating to this incident, she would listen; one time in particular while we were talking, Mr. Baruth was merely relating over again what he had related to us, that is, one part of it, and that is when she came up to the bed room door, or at least when she came in and was shooting at him, and he says,— well, he started to tell, when she stopped—we were talking and she stopped to listen, and I heard him distinctly, the words he used, he says 'She commenced shooting' and he says 'I threw up my hands and hollered for God's sake stop you have shot me now' and he says 'I was retreating back in the bed room as fast as I could' and he says 'she kept on shooting and he bleeding.' He was just merely relating what he had related to Connelly and myself; she turns right around to me

and looks at me and says 'Yes,' she says, 'He ought to have stopped when I told him to.' I don't know but what that is about all of the story."

It is the contention of counsel for the appellant that the admission of these recitals in evidence was error. They argue first that it was not shown that they were made in the presence or hearing of the appellant, or if in her hearing that they were made under such circumstances as called for a denial upon her part; and second, that if any part of it was admissible the court opened the door too wide, in that he permitted the witnesses to recite statements denunciatory of the appellant which could not have been evidence against her even had the person making the statements been upon the witness stand himself.

But before discussing these objections, it is necessary to notice for a moment the legal aspects of the question. Counsel for the state contend broadly that any statement or declaration of the person injured made to a third person, in the presence or hearing of the accused, either charging him directly with the crime or pertaining to matters otherwise relevant to the issue, if not denied by the accused, may be given in evidence against him as an admission on his part. On the other hand, the appellant contends that the mere presence or hearing of the accused is not alone sufficient to render the evidence admissible, but the statements must relate to the matter at issue, must be addressed to the accused, or made under such circumstances as would ordinarily and naturally call for some action or reply from persons similarly situated; and that, if the condition be one of doubt as to whether a reply should or should not have been made, the evidence should not be received. There are cases which support the respondent's contention, many of which are collated in its brief. But we think the better authority is with the appellant. Greenleaf, in his work on evidence, while stating that admissions may be implied from the silent acquiescence of a party in the statements

of another, adds that nothing can be more dangerous than evidence of this kind, and that it should always be received with caution, and never received at all unless the evidence is of direct declarations of that kind which naturally calls for contradiction, and then makes this general observation:

"The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." 1 Greenleaf, Evidence (14th ed.), § 200.

In the Encyclopædia of Evidence, vol. 1, p. 367, the rule is stated as follows:

"So the silence of a party when a statement is made in his presence, against his interest, and is heard and understood by him, and is made in such way as to call upon him to deny it, if untrue, and the facts are within his knowledge, and the statement is made under such circumstances as naturally to call for a reply, amounts to an admission of the truth of the statement made, and may be sufficient to establish the fact as against him."

In *People v. Koerner*, 154 N. Y. 355, 374, 48 N. E. 730, the rule is stated as follows:

"That, under some circumstances, admissions by a party may be implied from his acquiescence in the statement of others, is an established principle of the law of evidence. A party's acquiescence, to have the effect of an admission, must exhibit some act of voluntary demeanor or conduct. When the claimed acquiescence is in the conduct or in the language of others, it must plainly appear that such conduct or language was fully known and fully understood by the party before any inference can be drawn from his passiveness or silence. Moreover, the circumstances must not only be such as afforded him an opportunity to act or to speak, but also such as would properly or naturally call for some action or re-

ply from men similarly situated. Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to ascertain what reply the party to be affected makes to them. If he is silent when he ought to have denied, the presumption of acquiescence arises. But it is clearly otherwise when his silence is of a character which does not justify such an inference. Thus, when a person is asleep, or intoxicated, or deaf, or a foreigner unable to understand the language employed, he cannot be prejudiced by statements made by others in his presence. Nor is such silence an assent, unless the statements were such as to properly call for a response."

See, also, *Davis v. State*, 131 Ala. 10, 31 South. 569; *Ackerson v. People*, 124 Ill. 563, 16 N. E. 847; *Commonwealth v. Brown*, 121 Mass. 69; *People v. O'Brien*, 68 Mich. 468, 36 N. W. 225; *State v. Swisher*, 186 Mo. 1, 84 S. W. 911; *Phelan v. State*, 114 Tenn. 483, 88 S. W. 1040; *People v. Amaya*, 134 Cal. 531, 66 Pac. 794.

And in this court, the question suggested, while it has not been before us in the form here presented, is not entirely new. In *Miller v. Territory*, 3 Wash. Ter. 554, 19 Pac. 50, where it was shown that the accused, when arrested and charged with the murder of one of his neighbors, displayed some agitation, and afterwards, when brought into the presence of the body of the murdered man and accused directly of the crime, made no answer but turned away and refused to again look upon the corpse, the court said that there was nothing in the defendant's conduct "which the most ingenious imagination could torture into an incriminating act." In *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044, the defendant was jointly informed against with one Wilson for having burglarized a saloon building and stealing therefrom a quantity of cigars. On his trial an officer was permitted to testify that Wilson made a confession to him implicating McCullum; that he had McCullum and Wilson brought before him when Wilson repeated his statement, and that McCullum when asked what he

had to say concerning it said there was nothing in it. It was held error to admit this testimony; the court saying:

"The fact that in this case Wilson's statement was made in the presence of the appellant and directed in part to the appellant did not thereby render it admissible. The fact that it was so made loses force when we come to consider that appellant was not voluntarily present, did not acquiesce in it, and was obliged to remain and listen to it whether he would or not."

And in *McCord v. Seattle Elec. Co.*, 46 Wash. 145, 89 Pac. 491, it was held that the statement of a third person concerning who was to blame for a street car collision, made to the plaintiff while she was recovering from the shock of the accident, was not admissible as an admission by her, since under the circumstances she could not reasonably have been expected to reply to it.

Adopting the rule contended for by the appellant, it is plain that she has just cause for complaint against the broad ruling made by the trial court. All that the deceased said concerning the shooting itself and its immediate cause, his conduct and the conduct of the appellant while it was going on, in fact, anything related by him that might properly be said to be a part of the *res gestae*, while the parties were in the position described by the witness Connelly, was properly admitted. The position of the parties at that time was such that it can be said that the statements were made in the presence of the appellant, and the circumstances were such that she might reasonably have been expected to reply, had she not intended to acquiesce in them. But this is as far as the statements were admissible. Anything said by him after the witness Steele left the room, closed the door between the two rooms, and engaged the appellant in conversation, could not be admissible. Even if she could under those circumstances hear if she listened acutely the recitals made by the deceased, clearly the circumstances excused her from replying to them. The statements were not addressed to her, neither

were they made in her presence, she could not be certain that Steele heard them, and it is too much to say that she ought to have opened the door and denounced them as falsehoods, or that she should have interrupted her conversation with Steele to declare to him their untruth if she did not intend to acquiesce in them.

We think, too, that the second ground of the appellant's objection is well taken. Both the prosecuting attorney and the trial judge seem to have proceeded on the theory that anything said by the deceased at this time touching his relations with the appellant was admissible as an admission on her part. The questions propounded to both Connelly and Steele, it will be noticed, called for the entire recital made by Mr. Baruth, regardless of its relevancy to the question in hand. The witnesses were permitted to detail his statements concerning the appellant's conduct towards him at other times than at the time of the shooting, the fact that he was at one time possessed of considerable property which he lost through her misconduct, and even the expressions of malice and hatred the deceased made against her. Manifestly this was improperly admitted. Her conduct towards him at other times than at the time of the shooting, as related by these witnesses, could hardly have been admissible as evidence had the deceased himself been on the stand testifying for the state, much less was it admissible when its only relevancy rests on the assumption that the appellant admitted the truth of the recitals by her silence; the statement concerning the loss of his property was irrelevant for any purpose; and his expressions of malice and hatred towards the witness, while perhaps harmless under normal conditions, were here highly prejudicial, since the recitals under the circumstances detailed by the witnesses took on the guise and solemnity of dying declarations, while they were, in fact, nothing more than the rancorous expressions of a partisan bent on justifying his own conduct, and condemning that of his assailant. The recitals should have been confined to what

was said concerning the immediate offense. See *People v. Smith*, 172 N. Y. 210, 231, 64 S. E. 814.

The appellant called as a witness one Dr. Byrne and proceeded to interrogate him concerning the character of the wounds received by Baruth, whether or not they were mortal, or of such a nature as to necessarily cause death. On an objection being interposed, the appellant's counsel stated that he proposed to show:

"That the wounds received by the deceased as proven in this case were not mortal wounds; that the best authorities state that in wounds of the upper arm death results in approximately one per cent of the cases; that septicaemia or blood poisoning is not the usual or necessary consequence of bullet wounds; that the Welch or gas bacillus does not of itself cause death and that if it was present in the wound it would have shown in the internal organs of the deceased; and that the treatment afforded the deceased by the physicians in charge was not the best medical treatment."

On this statement being made the court excluded any further evidence concerning the nature of the medical treatment; to which ruling the appellant duly excepted and assigns the same as error. It is at once manifest that the statement of counsel, even if proven, would afford no defense to the crime charged against the appellant. Where one unlawfully inflicts upon the person of another a wound calculated to endanger or destroy life, it is no defense to a charge of murder where death ensues to show that the wounded person might have recovered if the wound had been more skillfully treated. Even unskillful or negligent treatment of the wound on the part of the wounded person or his physicians, which may have aggravated the wound and contributed to the death, does not relieve the assailant from liability. He must show that the negligent and unskillful treatment was the sole cause of death, before he can escape the consequences of his unlawful act on this ground. *State v. Edgerton*, 100 Iowa 63, 69 N. W. 280; *State v. Landgraf*, 95 Mo. 97, 8 S. W. 237, 6

Am. St. 26; *Daughdrill v. State*, 113 Ala. 7, 21 South. 378; *Sharp v. State*, 51 Ark. 147, 10 S. W. 228, 14 Am. St. 27; *State v. Strong*, 153 Mo. 548, 55 S. W. 78; *Denman v. State*, 15 Neb. 138, 17 N. W. 347; Wharton, Homicide (3d ed.), § 35. Measured by this test the court did not err in excluding the proofs offered. These proofs did not tend to show that the subsequent treatment of the wound was the sole cause of the death, but that the treatment was unskillful and at most only contributed thereto. This did not constitute a defense.

The remaining assignments of error require no separate consideration. The legitimate evidence was sufficient to make a case for the jury, and no error was committed by the court in refusing to sustain the appellant's challenge thereto. Nor can we consider the assignment based on the failure of the court to give cautionary instruction concerning the evidence relating to the appellant's admission by silence. While doubtless cautionary instructions would have been proper, yet none were requested by the appellant, and it is the rule in this state that even positive errors must be called to the attention of the trial court and that court given a chance to correct them, before they can be available here.

For the error above noticed, the judgment is reversed and a new trial granted.

HADLEY, C. J., RUDKIN, CROW, ROOT, DUNBAR, and MOUNT, JJ., concur.

[No. 6811. Decided October 10, 1907.]

THE CITY OF SEATTLE, *Appellant*, v. RAY MACDONALD, *Respondent*.[1]

MUNICIPAL CORPORATIONS—ORDINANCES—SUPERSEDING BY STATE LAW—CRIMINAL LAW—OFFENSES—GAMING. A city ordinance making gambling a misdemeanor is not superseded by a general state law making the acts defined in the ordinance a felony.

GAMING—DESCRIPTION OF OFFENSE. An ordinance prohibiting many specific gambling games, and in general terms any game of chance for money whether or not of the kind mentioned, is broad enough to include the game of "twenty-six" although not enumerated.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 22, 1906, upon sustaining a demurrer to the complaint, dismissing a proceeding on appeal from a justice court and quashing a conviction of gambling in violation of an ordinance. Reversed.

Ellis DeBruler, for appellant.

Morris, Southard & Shipley, for respondent.

FULLERTON, J.—On November 17, 1899, the city of Seattle passed an ordinance relating to misdemeanors, § 23 of which reads as follows:

"Whoever deals, plays at, wagers anything of value on, or in any manner takes part in, or whoever carries on or causes to be opened, or who conducts, sets up, keeps or exhibits any game of faro, monte, roulette, lans-quenette, rouge et noir, rondo, poker, draw-poker, keno or E. O. or roulette table or shuffle board, or fan tan, or any gaming table or game whatever, for the purpose of gambling or any game of chance for the purpose of winning or securing money by chance, played with cards, dice or any device whatever, kind or nature, whether or not of the kind, character or nature herein mentioned for money, checks, credit or any representative of

[1]Reported in 91 Pac. 952.

value whatever, or whoever shall have in his possession to be used for the purpose of gambling or winning money by chance any gaming device whatever, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding six months, or by both." Ordinance, No. 5657, § 23, Seattle Revised Ordinances, p. 242.

On March 7, 1903, the legislature made it a felony to maintain a gambling resort; the act consisting of one section, which reads as follows:

"Section 1. Any person who shall conduct, carry on, open, or cause to be opened, either as owner, proprietor, employee, or assistant, or in any manner whatever, whether for hire or not, any game of faro, monte, roulette, rouge et noir, lansquenette, rondo, vingt-un (or twenty-one), poker, draw-poker, brag, bluff, thaw, tan, or any banking or other game played with cards, dice or any other device, or any slot machine, or other gambling device, whether the same be played or operated for money, checks, credits, or any other representative or thing of value, in any house, room, shop, or other building whatsoever, boat, booth, garden or other place, where persons resort for the purpose of playing, dealing or operating any such game, machine or device, shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for the period of not less than one nor more than three years." Laws 1903, p. 63, § 1.

On October 17, 1906, one W. I. Peer made complaint before the police judge of the city of Seattle charging the respondent with violating the ordinances above quoted, by playing at a dice gambling game called "twenty-six," for the purpose of winning money, cigars, and articles representative of money, by chance. The respondent pleaded not guilty to the charge before the police judge, and was tried and convicted and sentenced to pay a fine. The respondent appealed from the judgment of conviction to the superior court. In that court he filed a demurrer to the complaint on the ground, among others, that the facts charged did not constitute a crime. The superior court sustained the demurrer,

and entered a judgment quashing the conviction and dismissing the proceeding. The city appeals.

The learned judge of the superior court sustained the demurrer on the ground that the city ordinance, on which the complaint was predicated, had been superseded by the statute above quoted. He rested his decision on the principle that a municipality, in the absence of express authority conferred upon it by its charter, is without power to enact an ordinance making punishable an act which is made punishable as a criminal offense by the general laws of the state; and held, as a necessary corollary to that rule, that an ordinance making the doing of an act an offense, enacted by virtue of the municipalities general power, is superseded by a general law of the state legislature fixing and defining a punishment for the same act.

There are many cases, representing perhaps the weight of authority, which support the rule followed by the trial judge. This court, however, has adopted the contrary rule. In *Seattle v. Chin Let*, 19 Wash 38, 52 Pac. 324, we held that the city of Seattle by virtue of certain provisions contained in its then charter, which have been continued in its present one, authorized it to enact ordinances for the punishment of offences already made punishable by state laws. This rule is not without well-considered cases in its support, and, as we think it more in consonance with the principles of good government than is the rule followed by the trial judge, we do not feel that it ought to be overruled or modified. We hold, therefore, that the ordinance was not superseded by the general statute quoted.

It is further contended that the judgment must be sustained on the ground that the game the defendant played at is not one prohibited by the ordinance. It is true the game known as "Twenty-six" is not enumerated in the ordinance, but the ordinance is general in its terms, and prohibits a person from playing at any game of chance played with dice

for money, or representatives of money, and is broad enough to include the game played at by the respondent.

The judgment appealed from is reversed, and the cause remanded with instructions to reinstate the case and overrule the demurrer.

HADLEY, C. J., RUDKIN, CROW, ROOT, DUNBAR, and MOUNT, JJ., concur.

[No. 6714. Decided October 10, 1907.]

PHILLIP DAVIS, *Respondent*, v. COEUR d'ALENE & SPOKANE RAILWAY COMPANY, *Appellant*.[1]

STREET RAILROADS—INJURY TO PERSONS DRIVING ACROSS TRACK—CONTRIBUTORY NEGLIGENCE. The driver of an express wagon, who sees an approaching electric car about a block away and proceeds to drive across the street car track without giving any further heed to the car, is guilty of contributory negligence precluding any recovery for injuries from a collision between the car and his wagon.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 18, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Reversed.

Belden & Losey, for appellant.

Samuel R. Stern, for respondent.

RUDKIN, J.—This action was brought to recover damages for injuries to person and property resulting from a collision between the electric cars operated by the defendant company and the plaintiff's express wagon, at the intersection of Browne street and Maine avenue, in the city of Spokane. The plaintiff had judgment for the sum of $270.83, and the defendant appeals.

[1]Reported in 91 Pac. 839.

The material facts are these: On the morning of March 29th, 1906, the respondent came out of the alley into Browne street near Main avenue, driving an express wagon loaded with empty bottles. As he proceeded along Browne street to its intersection with Main avenue, he saw the electric cars operated by appellant coming towards him on Main avenue about a block distant. Without giving further attention to the approaching cars, he proceeded to cross Main avenue, and as he did so the cars struck the rear of the wagon, causing more or less damage to the vehicle and injury to the person of respondent, for which a recovery was sought in this action. Two grounds of negligence were charged in the complaint; first, that the cars were running at a speed of more than eight miles per hour, in violation of the ordinances of the city of Spokane; and second, failure to sound the whistle or ring the bell.

The only testimony offered in support of the first ground of negligence was that of a small boy of thirteen years of age, who testified that the cars were running about "Eight, or ten or twelve miles an hour, somewhere along there." Inasmuch as the respondent saw the approaching cars and knew of their presence, it is not easy to see how his jeopardy was increased by the failure to sound the whistle or ring the bell; but, if we concede that there was sufficient evidence of negligence on the part of the appellant to carry the case to the jury, yet, we think, the evidence discloses a clear case of contributory negligence on the part of the respondent, under the ruling of this court. He saw the approaching cars a block or less away; he did not stop until the cars passed; he did not increase his own speed to avoid a collision, nor did he pay the slightest attention to the movement of the cars. In *Criss v. Seattle Electric Co.*, 38 Wash. 320, 80 Pac. 525, the plaintiff saw a street car approaching at about the same distance and proceeded to drive his team across the track in about the same manner. In *Coats v. Seattle Electric Co.*, 39 Wash. 386,

81 Pac. 830, the plaintiff saw a car approaching from the rear, while driving along the track of the railway company, and proceeded to cross the track without giving further heed to the approaching car. In each case this court held that the contributory negligence of the plaintiff barred a recovery, and even a greater lack of care and caution on the part of the respondent is disclosed by this record.

The judgment is therefore reversed, with directions to dismiss the action.

HADLEY, C. J., CROW, DUNBAR, ROOT, and MOUNT, JJ., concur.

[No. 6741. Decided October 10, 1907.]

LEE H. ROBINSON, *Respondent*, v. SPOKANE TRACTION COMPANY, *Appellant*.[1]

DAMAGES—EVIDENCE—ADMISSIBILITY—APPEAL—HARMLESS ERROR. In an action for personal injuries resulting in neurasthenia, it is error to exclude defendant's evidence tending to show the effect that the worry and excitement incident to the lawsuit would have upon the plaintiff; but the same may be without prejudice upon a proper reduction of the verdict (RUDKIN, J., dissenting).

APPEAL—REVIEW—HARMLESS ERROR. Error in instructions emphasizing the importance of, or commenting on certain evidence, may be without prejudice upon ordering a reduction of the verdict.

DAMAGES—INJURIES—EXCESSIVE VERDICT. A verdict for $8,000 for injuries to the back, plaintiff being a young man 23 years of age, is excessive and should be reduced to $5,000, where, upon conflicting evidence, it overwhelmingly appeared that the injuries resulted only in neurasthenia instead of myelitis as claimed by defendant.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered October 27, 1906, upon the verdict of a jury for $8,000 damages for personal injuries sustained by a passenger in a street car collision. Affirmed on condition of remitting $3,000.

[1]Reported in 91 Pac. 972.

Graves, Kizer & Graves, for appellant.

Kenyon & Setters, for respondent.

Root, J.—This is an action for damages for personal injuries sustained by plaintiff while riding in one of defendant's street cars. From a judgment for $8,000, the defendant appeals.

On the trial of the cause the defendant admitted negligence, and the only questions submitted to the jury were those having to do with the amount of the recovery. The facts revealed by the evidence are about these: Plaintiff was seated in the forward end of the car, with one shoulder against the end of the car and the other against the side, his back being toward the corner. A collision occurred, and he says that he was thrown from the front of the car and struck his breast against a seat. After the collision he rode down town, alighted from the car, and walked into a tailor shop, where he was employed as a solicitor. Shortly thereafter a physician was sent for, who came and made a casual examination of plaintiff and advised him to go to the hospital, where the doctor soon followed. This doctor says that at the hospital he stripped plaintiff and made a thorough examination, and found no evidence of any injury, no mark or contusion; that plaintiff complained of pain behind the left shoulder blade. The doctor found his respiration and pulse normal, and no loss of motion or paralysis of any description. He directed that he apply some ointment to his back and take a rest.

Shortly after this, the family physician of plaintiff was summoned and made an examination of plaintiff, and took charge of the case from that time on, making visits upon him as follows: One in January, eight in February, one in March, one in April, one in May, and gave him one prescription in July. The accident occurred January 31, 1906, and the case came on for trial October 11, 1906. The family physician was a witness for plaintiff upon the trial. Testifying to his first examination, he stated as follows:

"He was apparently suffering a great deal of pain, the muscles of his back were rigid, and upon movement or touch it seemed to cause him a great deal of distress. Q. Were there any other evidences of injury? A. No; I do not remember of any other at the present time."

This doctor, until a few weeks before the trial, considered plaintiff's condition as one of neurasthenia, and plaintiff's complaint alleged that the injuries had induced and resulted in a neurasthenic condition. Upon the trial, however, plaintiff changed this theory and urged that the injury had resulted in myelitis instead of neurasthenia. Neurasthenia is a somewhat indefinite term applied to certain nervous conditions, while myelitis is a diseased condition or degeneration of the spinal cord, and is regarded as a much more serious ailment than neurasthenia. The family physician, upon the witness stand, was asked as to the present nervous condition of plaintiff. He answered: "He seems to be extremely nervous at the present time, in the way that he had not full control of his nervous faculties and his nerves are very irritable, more irritable than a nervous person." It was urged on behalf of plaintiff that there was a fracture of the rib where it joins the twelfth dorsal vertebra. With reference to this the family physician testified as follows:

"Q. Did you diagnose the case as fracture of the rib at the twelfth dorsal vertebra? A. I could not. Q. On the contrary, you diagnosed it as not being any fracture, did you not? A. I think I did, yes, sir."

It was the contention of plaintiff that the fracture had superinduced myelitis. The following questions were propounded to this physician, and answered as indicated:

"Q. Now, what kind of myelitis is this? A. Well, there is a lesion of the spinal cord and degeneration of the tracts of the spinal cord; but I am not up in nervous diseases—not enough to know the distinction between the anterior and ~~positive~~ or lateral. Q. You are expert enough to know it is myelitis, but not expert enough to know what kind of myelitis it is? A. Yes."

Besides this physician, the plaintiff put upon the stand one other. He made some radiographs with an X-ray machine, and gave it as his opinion that there was a fracture of the twelfth dorsal vertebra, or of the rib where it connects therewith. He was unable, however, to give any dimensions whatever of the fracture, or any definite description thereof. The pictures were placed in evidence. Each of these two doctors gave it as his opinion that plaintiff was suffering from myelitis, and each testified that he thought that a portion of the conditions now existing would be permanent. Plaintiff remained at the hospital about one week and was then taken to his home, where he remained for about three months before going out. The chart record kept by the nurse at the hospital was introduced in evidence. The record of the first night was not on the chart. The latter showed that the plaintiff slept well every night except the first night recorded, when he slept only part of the night. The nurse who prepared the chart and waited upon respondent testified that the attending physician directed that certain medicine to produce sleep be given the patient in case he was unable to sleep, but that the medicine was not given, for the reason that he slept readily without such medicine. Plaintiff testified that he took medicine, after leaving the hospital, to make him sleep.

The defendant placed upon the witness stand six physicians. One of them was a doctor whom the plaintiff or his family had called to examine him, and most of them were physicians who had been appointed as a commission to make an examination of the plaintiff's condition. All of these doctors swore positively that plaintiff's condition was not myelitis, but neurasthenia. Most of these doctors were men of extended experience, and some of them of many years' experience with nervous ailments and conditions. Several of them showed themselves to be well acquainted with radiographs, and upon examination of the pictures in evidence, stated positively that there was nothing whatever therein to show any injury to the

vertebra or ribs, or anything whatsoever abnormal. None of the doctors on either side found any scars or any outward indications in an injury, except that shortly after the injury the muscles in the small of the back were somewhat swollen. The plaintiff appeared to still have a pain in that region, leaned forward when sitting, and in rising from a sitting position appeared to require a cane or something to take hold of in order to rise, and was evidently in a nervous condition, frequently contracting various muscles of the body and acting uneasily. Plaintiff testified that he had lost some twenty pounds in weight, and that he had suffered much pain and sleeplessness and was unable to walk without canes. His skin was not of good color. Some of the muscles of the hips and legs did not appear to act normally.

Plaintiff placed in evidence a report of the commission of physicians who examined him. It contained a history, showing that he was in bed seven weeks with typhoid fever in 1904, and had not been so strong since, although he testified that he had been in as good health; that in 1901, a horse fell upon him, fracturing his right leg above the ankle. He was twenty-three years old, and testified that he was earning from $70 to $85 per month.

Exception was taken to the action of the trial court in refusing to let the defendant show what effect upon neurasthenia the pendency of a lawsuit, the interest in and the excitement of the approaching trial, would have. We think this evidence was admissible. Certain remarks of the court and his manner of giving instructions to the jury are complained of, as constituting comments upon the evidence and as calculated to emphasize the importance of certain testimony favorable to plaintiff at the expense of defendant. In view of the disposition which we propose to make of the case, we think it unnecessary to go into these matters in detail.

Appellant makes no denial of its liability, but contends that the verdict was excessive, and asks to have the amount of the judgment reduced.

Taking into consideration all of the evidence in this case, and viewing it from any reasonable standpoint, as favorably as possible to respondent, we are unable to find justification for a verdict in the amount returned by the jury. The case was prosecuted upon the theory that the damages sustained by plaintiff arose principally from the injuries to his back, and the issue became sharply defined as to whether those injuries had produced a condition of neurasthenia or myelitis. It was conceded that, if it were the latter, the damages should be greater than if the condition were the former. The evidence as it appears from this record is overwhelmingly in favor of the defendant's contention. There were six of defendant's doctors to two of plaintiff's, and it cannot be seriously contended that the evidence of each of these doctors does not compare at least favorably with that of plaintiff's physicians. In many particulars it is much more reasonable and satisfactory. Neither of plaintiff's physicians claims to have had any extended special practice or experience in nervous ailments. We recognize the fact that a jury and trial court have the advantage of seeing and hearing the witnesses and observing their demeanor upon the witness stand. But, making full allowance for this and also for the fact that reasonable men may differ considerably as to what is a suitable award in a case of this character, we are constrained to hold that no jury should, or could properly, base a verdict exceeding $5,000 in amount upon the evidence adduced in this case. If we were fixing the amount, as an original proposition, we would place it at a lower figure.

The case is reversed and remanded to the lower court with the following instructions: The respondent shall have thirty days after filing of the remittitur in the superior court within which to remit all of the judgment in excess of $5,000. If such remission be made, the judgment will stand affirmed; but if not, a new trial shall be ordered.

Hadley, C. J., Mount, and Crow, JJ., concur.

RUDKIN, J. (dissenting)—The majority opinion holds that the court below erred in excluding testimony tending to show the effect that the worry and excitement incident to the pendency of a lawsuit would have on the disease from which the respondent was suffering, and in that conclusion I concur; but I cannot concur in the final disposition made of the case. Doubtless, where the injury resulting from an error committed in the trial of a cause can be segregated from the amount of the verdict, which is otherwise supported by the testimony, the judgment may be affirmed for the residue, on the remission of the excess by the prevailing party; but where it is impossible or impracticable for the appellate court to ascertain or determine the extent to which the verdict has been affected by the erroneous ruling a new trial must be awarded. In *St. Louis etc. R. Co. v. Hall*, 53 Ark. 7, 13 S. W. 138, the court said:

"The difficulties which would beset a court in determining the justness or excessiveness of a verdict based upon these premises alone would not be inconsiderable. But superadd the element of punitive damages, erroneously allowed, and the process by which the court is to dissect the verdict, eliminate the error, eliminate the excess of compensation, and settle upon the exact sum which plaintiff's case entitles him to have, 'passeth all understanding.' To attempt it, we think, would be in violation of the spirit of the consitution, which intends that every litigant shall have a trial of his cause before an impartial jury upon proper declarations of the law."

In *Houston etc. R. Co. v. Bird* (Tex. Civ. App.), 48 S. W. 756, the court said:

"In the absence of evidence from which the jury could properly ascertain the amount of loss sustained in impairment of ability to earn money, it was error for the court to submit this element to the jury, and because of the absence of such evidence we think also that the verdict is excessive. What would be a proper amount, with appropriate evidence on the points indicated, this court cannot, of course, determine, and,

since there was error in the charge, it cannot be cured by a remitter."

To the same effect see: *Chicago etc. R. Co. v. Hall*, 90 Ill. 42; *Seeman v. Feeney*, 19 Minn. 79; *Slattery v. St. Louis*, 120 Mo. 183, 25 S. W. 521; *Thompson v. Lumley*, 7 Daly 74; 3 Cyc. 439.

If competent material testimony was excluded from the consideration of the jury, and is not now before this court, how the majority can say what the judgment should be, likewise "passeth all understanding." To have reached the conclusion announced, the members of the court must have turned jurors and expert witnesses as well. In effect the majority has said to the appellant: you were denied a fair trial in the court below, but you must nevertheless submit to the payment of the largest judgment that any reasonable view of an incomplete record will warrant. From such an anomaly I dissent.

[No. 6790. Decided October 10, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Liberty Lake Irrigation Company et al., Appellant*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent*.[1]

EMINENT DOMAIN—WATER RIGHTS—IRRIGATION—PROCEEDINGS—PETITION—SUFFICIENCY. In proceedings to condemn the right to water for irrigating purposes, it is not a fatal defect to omit from the petition a statement of the time that the water is to be used, as required by Bal. Code, § 4143, where from other allegations it appears that a perpetual use is desired.

SAME—NECESSITY—DEFENSES. In such proceedings, the fact that the petitioner has appropriated and may obtain a large supply from another source will not defeat the condemnation.

SAME—PROPERTY SUBJECT—RIPARIAN RIGHTS—WATERS USED OR NEEDED. Under Bal. Code, § 4156, condemnation of the rights of abutting owners to the use of the waters of a stream is limited, and

[1]Reported in 91 Pac. 968.

cannot include waters used or needed by the riparian owner for his lands then irrigated or which he intends to irrigate within a reasonable time.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered July 6, 1906, adjudging a public use, etc., in an action to condemn a way for a ditch and the riparian rights to the waters of a nonnavigable arm of a lake. Reversed.

Gallagher & Thayer, for relators.

Happy & Hindman and *Allen & Allen*, for respondent.

Root, J.—This is a proceeding to review an order of condemnation made in the case of Spokane Valley Land and Water Company v. Liberty Lake Irrigation Company and Arthur D. Jones & Company. The order was for the condemnation of a way for a ditch and the riparian or littoral rights of relators to the waters of a nonnavigable arm of Liberty Lake. In the years 1904 and 1905, the water company built a dam across an arm of the lake which prevented the water thereof from reaching relators' premises. An action was brought to enjoin the company, and the court granted an injunction against further interference with the water until the water company should condemn the use of the water in the arm of the lake. Thereupon the present proceeding was had, and from the order of condemnation made, this appeal is prosecuted.

The relators contend, (1) "that the courts have never been granted power to condemn water which is 'needed' by the owner for irrigation purposes [Bal. Code, § 4156 (P. C. § 5871)]; (2) the water company does not need this water because it owns an ample supply in the Spokane river; (3) no proof was made as to the extent of time the water sought to be condemned is intended to be used." We will notice these contentions in the inverse order.

Bal. Code, § 4143 (P. C. § 5858), provides that the petition for condemnation shall set forth the extent of time that said water is intended to be used. We think that ordinarily the petition should set forth a statement to this effect, but do not believe that the omission so to do is fatal to a judgment or decree in the proceeding, where the other facts set forth in the petition are such as to show, as they do in this case, that the purpose was doubtless to make a perpetual use of the water so condemned and appropriated.

As to the second contention, it appears from the record that the water company had appropriated, and was capable of using, a large supply of water from the Spokane river. We do not think, however, that this fact in itself is sufficient to defeat the order of condemnation made herein.

As to the first contention, the parties hereto are at variance touching the meaning of the word "needed," as used in § 4156 *supra*, which is as follows:

"The right herein given to condemn the use of water shall not extend any further than to the riparian rights of persons to the natural flow of water through lands upon or abutting said streams or lakes, as the same exists at common law, and is not intended in any manner to allow water to be taken from any person that is used by said person himself for irrigation, or that is needed for that purpose by any such person."

Relators contend that the statute authorizes and requires an exception from the condemnation order of all the water that is used by such owner or that may be hereafter needed to irrigate the lands abutting upon said stream or lake. The trial court, however, held that the meaning of the statute was that the riparian owner could reserve so much of the water as was "used *and* needed." It was contended by respondent that, under the act of Congress approved March 3, 1877 (1 Supp. to U. S. Rev. Stats. 137), relators had no riparian or littoral rights, inasmuch as their land was not patented by the government until after the date of the passage of this act. Assuming, but not deciding that this is correct, we think the effect

of § 4156, *supra*, justifies relators in objecting to the condemnation by the water company of so much of the water as is used or needed for irrigation by them upon their abutting lands. If, under this act of Congress, the owner of land abutting upon a nonnavigable stream or body of water, has no littoral or riparian rights therein, nevertheless it would seem that, after the issue of patent for such land by the United States, the duty would devolve upon the state to provide how "the appropriation and use of the public," mentioned in the statute, should be exercised. By § 4156, *supra*, it is provided that a portion of this water shall be reserved to that part of the public using or needing the water upon abutting property. We perceive nothing in this requirement of the statute inconsistent with the act of Congress.

In the recent case of *State ex rel. Kettle Falls etc. Irr. Co. v. Superior Court Stevens County*, 46 Wash. 500, 90 Pac. 650, this court said:

"Under Bal. Code, § 4156 (P. C. § 5871), the ordinary abutting owner must submit to the condemnation of his riparian rights to the natural flow of the water as at common law, with the limitation, however, that water 'that is used by said person himself for irrigation, or that is needed for that purpose by any such person' may not be condemned."

See, also, *Nesalhous v. Walker*, 45 Wash. 621, 88 Pac. 1032.

The question then turns upon the meaning and intention of the legislature by the expression "needed,' as employed in § 4156, *supra*. We think it means the water necessary to irrigate the land of the littoral or riparian owner which he now has under irrigation, and also that which he intends to, and will, place under irrigation within a reasonable time. It cannot be supposed that the legislature intended that a riparian owner could prevent an irrigating company from appropriating water not then in use but which the riparian owner might need and use upon his land at some distant, indefinite time in the future. Such a construction would be in the interest of the speculator rather than for the encouragement of the land

improver and home builder. The statute gives the riparian owner a preference right, upon the theory that he needs and will avail himself of the privilege thus given him. If he is not using the water and does not propose to use it as soon as practicable in the ordinary and reasonable development or cultivation of his lands, then there is no reason why the water should be withheld from others who need and will promptly use it if permitted. Irrigation is an important means of developing the country and making its arid lands productive and valuable. Hence, the state has made provision therefor. It is not to the state's interest that the water of a nonnavigable stream should be idle or going to waste because one of its citizens, having a preference right to its use, unjustifiably neglects to avail himself thereof, while others stand ready and willing, if permitted, to apply it to the irrigation of their arid lands. On the other hand, the preference accorded an abutting property owner should not be limited to his immediate present use of the water. Circumstances justifying some delay might be such as to prevent him from constructing the ditches, flumes, dams, piping, and other equipment necessary to place all of his irrigable land under irrigation at once. We think it comports with the general policy of the state to hold that this statute contemplated the use by the abutting owner of the water necessary for his present needs and for those that accrue as he in good faith proceeds with reasonable dispatch to construct the means for applying the water to his adjacent arid land.

The order of condemnation made by the honorable superior court herein is reversed, and the case remanded with the following instructions: The trial court shall ascertain how much of appellant's land is ready for water at this time, and how much of its land (owned at the time this action was commenced) it intends to and will within a reasonable time—say two or three years—place under irrigation from the waters sought to be condemned. Upon ascertaining the facts as to

these matters, the order of appropriation shall except from its operation a sufficient amount of water to meet the present needs of relators and the needs that will accrue within a reasonable period of the immediate future; so far as the court can determine by the preparations made, and from all the facts and circumstances shown, and the expressed intentions and purposes of relators, and their evident good faith relative to promptly placing said lands under irrigation. If the relators fail to use promptness and good faith in appropriating and using the water reserved to irrigate their abutting lands, and at the end of the period fixed by the court, as hereinbefore indicated, it shall appear that they have not under irrigation a sufficient amount of land to make necessary the use of all the water reserved to them in the decree now to be entered, said decree shall not be a bar to another application for condemnation of such of the reserved water as is not then needed and used.

HADLEY, C. J., CROW, and DUNBAR, JJ., concur.

[No. 6746. Decided October 11, 1907.]

D. W. ZENT, *Appellant*, v. MAGGIE SULLIVAN *et al.*, *Respondents*.[1]

HUSBAND AND WIFE—NECESSARIES—DIVORCE—WIFE'S CONTRACT FOR ATTORNEY'S FEES. The husband is not liable upon the contract of his wife to pay attorney's fees for the prosecution of a divorce, the same not being "necessaries" in view of the liberal provisions of Bal. Code, § 5722, relegating the matter to the trial judge.

SAME—EVIDENCE—SUFFICIENCY. In an action against a husband, after settlement of a divorce case, for attorney's fees contracted for by the wife in the divorce action, a nonsuit is properly granted where the contract shows on its face that it was intended as the individual obligation of the wife in addition to fees allowed by the court, and where there was a failure to show the value of the services, or that there were reasonable and justifiable grounds for the divorce.

[1]Reported in 91 Pac. 1088.

Appeal from a judgment of the superior court for Adams county, Warren, J., entered October 19, 1906, upon granting a nonsuit at the close of plaintiff's evidence, dismissing an action to recover an attorney's fee. Affirmed.

Zent, Lovell & Hamilton, for appellant.

O. R. Holcomb, for respondents.

RUDKIN, J.—On the 14th day of January, 1906, the plaintiff entered into a written contract with the defendant Maggie Sullivan, whereby he agreed to commence and diligently prosecute an action for divorce in favor of said Maggie Sullivan against her husband, John C. Sullivan, her codefendant herein; and on her part said Maggie Sullivan agreed that the plaintiff should receive for his services in that behalf the sum of $500, or $250 in the event that such action should be dismissed before final judgment; such sums to be in addition to any sums allowed or awarded by the court in the divorce proceedings. On the following day the divorce action was commenced by the filing of the complaint and the service of a summons, but the action was thereafter dismissed by consent of the parties before final judgment. This action was thereupon commenced against both the husband and wife to recover the stipulated fee. The plaintiff proved the execution of the contract for the fee by the defendant Maggie Sullivan, the commencement and dismissal of the action for divorce, offered in evidence the contract and the files in the divorce action, and rested. A motion for nonsuit interposed by the husband at this stage was sustained, and from the judgment of nonsuit the present appeal is prosecuted.

There is a conflict of authority on the question of the husband's liability for counsel fees incurred by the wife in connection with divorce proceedings, whether she be plaintiff or defendant. In Alabama, Arkansas, Connecticut, Illinois, Indiana, Kentucky, Massachusetts, Missouri, Nebraska, New Hampshire, Vermont, and Wisconsin, the rule of nonliability

is asserted without qualification. *Pearson v. Darrington*, 32 Ala. 227; *Kincheloe v. Marriman*, 54 Ark. 557, 16 S. W. 578, 26 Am. St. 60; *Shelton v. Pendleton*, 18 Conn. 417; *Dow v. Fyster*, 79 Ill. 254; *McCullough v. Robinson*, 2 Ind. 630; *Williams v. Monroe*, 18 B. Mon. (Ky.) 514; *Coffin v. Dunham*, 8 Cush. 404, 54 Am. Dec. 769; *Isbell v. Weiss*, 60 Mo. App. 54; *Yeiser v. Lowe*, 50 Neb. 310, 69 N. W. 847; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695; *Clarke v. Burke*, 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631.

Thus in *Shelton v. Pendleton, supra*, decided in 1847, the court said, "This demand of the plaintiffs has no support from any precedent to be found by us in this country or elsewhere." And in *Coffin v. Dunham, supra*, decided in 1851, Shaw, C. J., said: "This action is without precedent in this commonwealth, and contrary to the practice and course of decisions." On the other hand, in the following more recent cases, the right of recovery is sustained, with certain qualifications and limitations: *Ottaway v. Hamilton*, 3 C. P. D. 398; *Stocken v. Patrick*, 29 L. T. S. 507; *Sprayberry v. Merk*, 30 Ga. 81; *Porter & Moir v. Briggs*, 38 Iowa 166, 18 Am. Rep. 27; *Preston v. Johnson*, 65 Iowa 285, 21 N. W. 606; *Clyde v. Peavy*, 74 Iowa 47, 36 N. W. 883; *McCurley v. Stockbridge*, 62 Md. 422, 50 Am. Rep. 229; *Langbein v. Schneider*, 16 N. Y. Supp. 943; *Hahn v. Rogers*, 69 N. Y. Supp. 926; *Ceccato v. Deutschman*, 19 Tex. Civ. App. 434, 47 S. W. 739; *Dodd v. Hein*, 26 Tex. Civ. App. 164, 62 S. W. 811; *Peck v. Marling's Admr's*, 22 W. Va. 708.

In *Johnson v. Williams*, 3 G. Greene 98, decided in 1851, the supreme court of Iowa said, "We find no case where the husband has been sued and a recovery had upon the ground of necessaries." In *Porter v. Briggs, supra*, the court later permitted a recovery by the wife's attorney against the husband, where the wife had been sued for a divorce on the ground of her adultery. And in the still later case of *Preston*

v. Johnson, supra, the court seems to recognize the right of the attorney to recover against the husband in all cases, subject to the single requirement that he acted in good faith. It will thus be seen that the clear weight of authority is against the attorney's right of recovery in such cases, and this much the appellant concedes. It certainly cannot be said, as a universal rule, that expenses incurred by the wife in obtaining or attempting to obtain a divorce from her husband are for necessaries, as that term has been uniformly defined by the courts. On the other hand, if the law made no other provision for the prosecution or defense of such actions by the wife, there would be strong and perhaps controlling reasons for holding, in some individual cases, that the expenses incurred were necessary for the protection of the wife, and that she had implied authority to pledge the husband's credit for their payment. But our statute makes very liberal provision for the wife in such cases. Bal. Code, § 5722 (P. C. § 4636), provides that:

"Pending the action for divorce the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper, and such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof; and on decreeing or refusing to decree a divorce, the court may, in its discretion, require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action, when such divorce has been granted or refused, and give judgment therefor."

In view of the liberal provisions of this statute, we see no possible reason why the wife is under a necessity to pledge her husband's credit for the expenses of prosecuting or defending an action for divorce in this state, or why she should have any implied power in that regard. The divorce court has before it the parties, their property, their merits and delinquencies, and can fix the amount of the husband's liability to the wife and her attorney on an equitable basis, without any inquiry

into collateral facts; and we are satisfied that the rights of all parties will be best subserved by relegating the question of the husband's liability for the attorney's fees of the wife to that tribunal. It was so held in *Clarke v. Burke, supra,* under similar statutory provisions, and the rule there announced meets our approval. It may be said that such a rule will permit the wife to defraud her attorney, but such a result may happen in any case where the attorney is dependent on the fruits of the litigation for his compensation. Furthermore, the implied power of the wife to bind the husband, if it exists at all, exists for her own benefit and protection, not for the benefit or protection of those with whom she may deal.

There are additional reasons why the judgment in this case should be affirmed. In the first place, the contract in suit shows upon its face that it was, and was intended to be, the individual obligation of the wife. It provided for the payment of the sums specified, regardless of any allowances made by the court in the divorce proceedings, and the complaint filed on the following day prayed for an attorney's fee of $500 against the husband. Surely the husband cannot be held liable on such a contract as this. In *Sprayberry v. Merk, supra,* cited by the appellant, the court held, that the husband was chargeable with the real value of the services rendered, not with the price which the wife might fix by contract. Again, the courts which permit a recovery, almost without exception impose upon the attorney the burden of proving that the divorce action was instituted on reasonable and justifiable grounds — not reasonable and justifiable grounds on paper, but reasonable and justifiable grounds in fact. Such proof in actions of this kind would seem indispensable, for in no other way can the necessity for the services or the implied power of the wife be made to appear. No such showing was made in this case. Inasmuch as the abstract question of the husband's liability in such cases was the only question discussed in the briefs, we preferred not to rest our decision upon

these latter grounds alone; but for the several reasons herein stated the judgment must be affirmed, and it is so ordered.

Hadley, C. J., Fullerton, Crow, Dunbar, and Mount, JJ., concur.

[No. 6784. Decided October 11, 1907.]

Joseph E. Vinnette, *Respondent*, v. Northern Pacific Railway Company, *Appellant*.[1]

Death—Action by Parent—Contributory Negligence—Evidence—Sufficiency. The negligence of parents in permitting a child six years of age to cross the tracks of a switch yard in front of their home, frequently used by the railroad company, and leaving her there to play unattended, precludes any recovery for the death of the child, who was run over by a train in switching cars.

Appeal from a judgment of the superior court for King county, Morris, J., entered November 3, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for causing the death of a minor child upon a railroad right of way. Reversed.

Carrol B. Graves, for appellant.

Geo. P. Rossman, for respondent.

Crow, J.—Action by Joseph E. Vinnette against the Northern Pacific Railway Company to recover damages for the death of plaintiff's child. The plaintiff alleged, that his daughter, six years of age, was struck and killed by a backing train of freight cars while crossing defendant's tracks within the limits of the city of Seattle, upon a platted street and upon a crossing used and traveled by the general public; that a city ordinance then in force prohibited the running of any steam engine and cars in Seattle at a rate of speed exceeding six miles per hour; that the defendant was backing a train

[1]Reported in 91 Pac. 975.

of about sixteen cars at a greater rate of speed; that the defendant had no person on the lookout on the forward end of the train as it was moving backward; that no signal was given by bell, whistle, or otherwise, and that the child, being rightfully upon the alleged street and crossing, was killed by reason of such negligent acts of the defendant. The answer, after admitting the killing of the child, denied other material allegations of the complaint, and affirmatively alleged that the child was a trespasser upon the railway tracks situated in defendant's switching yards, and that her death was occasioned by the negligence of her parents who then and there permitted her to play along and upon the tracks. The reply denied the affirmative allegations of the answer. On trial, the jury returned a general verdict in favor of the plaintiff for $600, and made special findings in answer to interrogatories submitted as follows:

"At what rate of speed was the string of cars moving at the time it struck the child, Catherine Vinnette? Ans. About six miles an hour. At the time mentioned in the complaint and for some time prior thereto, was the switch track lying to the west of the main track at and near the point of the accident, used for the purpose of switching and storing cars? Ans. Yes. Did the man in charge of the string of cars, or either of them, have any knowledge of the child's whereabouts, prior to the collision with her, and did they know of the accident before their attention was called to it after the child had been killed? Ans. No. Who was left in charge of the child and had the custody of the child the morning of the accident and just prior to the accident? Ans. Her mother. If you answer to the last interrogatory that it was the mother of the child, find and state if the mother allowed the child to cross said railway track and enter into play with some other child or children near and in the vicinity of the railway tracks of the defendant and across said tracks from its home? Ans. Yes."

From a judgment entered on the general verdict, the defendant has appealed.

The appellant's assignments of error present the single question of the sufficiency of the evidence to sustain the general verdict and judgment. The evidence shows, that appellant had, when the accident occurred, two lines of railway track, running in a northerly and southerly direction and used exclusively for distributing, moving, and storing freight cars; that all trains enter and leave the city on other lines; that one of the tracks was known as the 'shore line," from which numerous spurs extended to various warehouses and industrial plants; that the other was known as the "long siding," being used for switching and storing cars; that the two tracks, being substantially parallel, were located side by side on a graded strip of land about thirty feet wide between a high bluff or hill to the east, and tide lands to the west; that the soil of the hillside is sustained by bulkheads; that the west line of the grade is sustained by a sea wall; that quite a number of small houses or shacks are located along the tracks, abutting the same on either side, those to the west being over tide lands and supported by piling; that a few feet further west is a public street or boulevard located on an elevated bridge constructed on piling over tide lands and occupied in part by a street car line running into the city of Seattle; that respondent's house is built on piling between the railroad track to the east and the boulevard to the west; that he had access to the boulevard; that, to the east of his house, towards and abutting the railway, he has a small dooryard, floored with boards resting on piles and inclosed with fence and gate.

There was no competent evidence that any street had ever been platted, opened, graded, or maintained in the space occupied by appellant's tracks between the sea wall and hill, nor that such space had ever been traveled by teams or used for general public traffic. There was evidence, however, showing that people living in the small houses and shacks above mentioned frequently crossed and walked along the tracks at various points according to their own convenience. The evi-

dence further shows that, at the time of the accident, a switching crew was backing about sixteen freight cars on the long siding; that respondent had left the child in charge of his wife, its mother, at their home, who permitted her to cross the tracks to the hill on the opposite side and play with other children; that after watching the child go across, the mother went into the kitchen, leaving the door open; that shortly thereafter the train backed down the long siding, when the child, returning alone and unattended, stepped on the track and was killed; that no employee of the appellant saw the child until after the accident; that no employee was on the car which struck the child, and that appellant made no claim to ringing its bell or sounding its whistle, its employees being engaged in moving freight cars within its switching yards, and not, according to its contention, upon any public street or highway. The only substantial conflict in the evidence was over respondent's contention that a well-defined pathway existed which was used by the general public and intersected the tracks immediately in front of his house.

In his brief the respondent continually assumes the existence of a highway called Ninth street, upon which the railway tracks were located and upon which his house fronted to the east, but there was no competent evidence showing that any such street ever existed. Respondent contends that, at the time the child was killed, she was on Ninth street opposite his house, on the above-mentioned alleged pathway that had been used by the public for many years. There was evidence given by different witnesses to the effect that people, both adults and children, living in the immediate neighborhood, had frequently crossed the tracks, but the evidence fails to show that there was a well-worn track at any particular point, as seems to be contended by respondent. A number of excellent photographs were admitted in evidence with the consent of both parties, but while they most clearly and distinctly show the buildings, railway tracks, abutment, sea wall, piling,

respondent's dooryard, fence, and gate, with other surroundings, it is nevertheless impossible to distinguish upon them the slightest indication of any street or any pathway across or upon the railway tracks at any point near the scene of the accident. The substantial effect of the evidence, as disclosed by these photographs and the oral testimony of the various witnesses, is that the different persons who lived in the neighborhood and who walked back and forth over the tracks did so at such points as were severally convenient to them. But were we to assume that a distinct pathway did exist opposite respondent's house, we could not, for reasons hereinafter mentioned, permit the respondent to recover in this action.

The appellant contends, that the train was not running at an excessive rate of speed; that there was no public street, crossing, or path, at or near the point of the accident; that it was not required to give any signal by bell or whistle; that the child was a trespasser; and that the contributory negligence of the parents bars a recovery by respondent. As we view the evidence, in connection with the special findings, there is no showing of negligence on the part of the appellant sufficient to make it liable for damages. But assuming that such negligence did exist, we are nevertheless compelled to hold that the negligence of the respondent as father of the child, and the mother in whose care she was left, was such that no recovery by respondent can be permitted. The child was of such tender years that no negligence could be imputed to her. She was unable to protect herself or realize the dangers to which she was subjected. Had she been not killed, but permanently injured, and were she now prosecuting an action for damages, the question whether the negligence of her parents could be imputed to her and bar a recovery might possibly arise. Here the father sues for damages resulting from the death of his child, and he will be the sole beneficiary of any judgment recovered.

In *Bellefontaine etc. R. Co. v. Snyder*, 18 Ohio St. 399, an action prosecuted by a minor child, by her next friend, to re-

cover damages sustained by personal injuries to herself, the supreme court of Ohio held that the negligence of a parent or custodian of the child, who was by reason of tender years unable to care for herself, could not be imputed to the child so as to defeat her right to recover damages from a railway company for the injuries caused by its negligent acts. But in *Bellefontaine etc. R. Co. v. Snyder*, 24 Ohio St. 670, when the father of the same child afterwards sued in his individual right for damages to himself arising from the loss of the services of his child in consequence of the same accident, the supreme court of Ohio held that he could not recover, as his right to do so was barred by his own negligence, it having appeared that he intrusted the child to the custody of another who was guilty of negligence contributing to the accident. This distinction between an action for the benefit of the child and for the sole benefit of the negligent parent has been recognized by this and other courts. *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 31 L. R. A. 855; *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64; *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 South. 555, 3 Am. St. 751; *Williams v. Texas etc. R. Co.*, 60 Tex. 205; *Bamberger v. Citizens' Street R. Co.*, 95 Tenn. 18, 31 S. W. 163, 49 Am. St. 909, 28 L. R. A. 486.

The unfortunate death of this little girl naturally arouses every feeling of human sympathy, and doubtless appealed to the jury, but the facts are that respondent's wife, with whom he left the child, assented to her going across the tracks unattended, that the mother watched her while leaving, that she was permitted to return alone, and that while doing so she was struck by the train before any of the switching crew saw her or knew of her presence. The acts of the parents constitute the most flagrant negligence upon their part. They must have known that the very existence of the railroad tracks was itself a sign of danger; that an unattended child only six years of age should not have been permitted to play upon or near them, and that if allowed to do so, the child would in all

probability be seriously, injured or killed. Parents cannot delegate to trainmen or other persons in charge of dangerous agencies the care and protection of their unattended children. In the case of *Westerberg v. Kinzua Creek etc. R. Co.*, 142 Pa. St. 471, 21 Atl. 878, 24 Am. St. 510, the supreme court of Pennsylvania said:

"If we concede there was negligence on the part of the company in permitting the car to become detached and run down the road without any one to control it, the fact remains that the children were walking upon the track, and, while they could not be charged with contributory negligence, by reason of their tender years, this suit is brought by their parents, who may be properly so charged. A parent owes a reasonable duty of protection to his children, and cannot cast the whole of that duty upon strangers. If he permits them, when of tender years, to wander off in places of known danger, and by reason thereof an accident occurs to them, he has no just claim to make others bear the consequences of his own neglect. We have a number of cases in which this principle has been enforced. In *Philadelphia etc. R. Co. v. Hummell*, 44 Pa. St. 375, 84 Am. Dec. 457, it was said that children of a tender age cannot be upon a railroad track without a culpable violation of duty by their parents or guardians. *In Philadelphia etc. R. Co. v. Long*, 75 Pa. St. 257, it was said by Agnew, C. J.: 'To suffer a child to wander in the street has the sense of permit. If such permission of sufferance exist, it is negligence.' To the same point is *Cauley v. Pittsburg etc. R. Co.*, 95 Pa. St. 398, 40 Am. Rep. 664; and see, also, *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365."

See, also, 1 Thompson, Commentaries on Law of Negligence, § 333; *Evansville etc. R. Co. v. Wolf*, 59 Ind. 89; *Jeffersonville etc. R. Co. v. Bowen*, 40 Ind. 544; *Senn v. Southern R. Co.*, 124 Mo. 621, 28 S. W. 66.

In *Bamberger v. Citizens' St. R. Co.*, *supra*, the action was prosecuted by the father as administrator of his deceased child for the benefit of himself as next of kin, and the supreme court of Tennessee, discussing his contributory negligence, said:

"The underlying principle in the whole matter is, that no one shall profit by his own negligence, and, to allow the

father, who has been guilty of negligence, to recover, notwithstanding that negligence, when he brings the suit as administrator, although he could not do so in his own right, would defeat this underlying principle by a mere change of form, when the entire recovery, in either event, goes to him alone. Upon principle, we think that, no matter how the suit is brought, whether as administrator or as father, it can be defeated by the father's contributory negligence, when he is sole beneficiary."

Assuming that the evidence in this case disclosed facts sufficient to go to the jury upon the question of the appellant's negligence, yet the negligence of the parents of this child was sufficient to demand a judgment for appellant. The house in which respondent lived was located upon and abutted the railroad. The evidence and exhibits show the place of the accident to have been a veritable death-trap for a small child. The mother, as found by the jury, had been left in the custody of the child at the time of the accident. She took the child to the door and permitted her to cross the tracks and play with other small children. The testimony shows that the tracks were frequently used by appellant. The parents should have known that cars might be passing and switching there at any moment. They could not have placed their child in greater peril. The mother's testimony shows that she must have been aware of its dangerous position. No parent should be permitted to recover for his own benefit damages resulting from the death of his child, where he himself has been guilty of negligence which proximately contributed to the accident causing such death.

The honorable trial court erred in refusing to sustain the appellant's motion for judgment notwithstanding the general verdict of the jury. The judgment is reversed, and the cause remanded with instructions to dismiss the action.

Fullerton, Mount, Root, and Dunbar, JJ., concur.

[No. 6397. Decided October 19, 1907.]

THE STATE OF WASHINGTON, *Appellant*, v. CHARLES W. AMES, *Respondent*.[1]

PILOTS—REGULATION—POWER OF STATE. The legislature has power to regulate pilotage of the public waters within the boundaries of the state so far as relates to vessels engaged in strictly foreign commerce, since Congress has not attempted to regulate the same.

STATUTES—VALIDITY OF PORTION. The invalidity of a provision for a penalty for acts made misdemeanors does not affect the balance of the act, as the misdemeanors are punishable under the general statute, Bal. Code, § § 6776, 7435.

STATUTES—TITLE—SUBJECTS INCLUDED—PILOTAGE. An act entitled "to establish pilot regulations" in certain waters, is broad enough to include provisions relating to a penalty for violation of the statute.

CONSTITUTIONAL LAW—CLASS LEGISLATION—PILOTS. An act requiring an applicant for a pilot's license to be a qualified voter does not unlawfully discriminate between citizens of the state.

PILOTS—STATUTES—CONSTRUCTION. The pilotage law, Bal. Code, §§ 3216-3243, applies to vessels propelled by steam as well as sailing vessels.

SAME. The pilotage law, Bal. Code, §§ 3216-3243, as amended by Laws 1901, p. 17, is not objectionable as indefinite or as prescribing different penalties for the same offense.

Appeal from a judgment of the superior court for Jefferson county, Hatch, J., entered March 23, 1906, upon sustaining a demurrer to an information charging the defendant with violation of the state pilotage laws. Reversed.

U. D. Gnagey, for appellant.

FULLERTON, J.—On February 20, 1906, the prosecuting attorney of Jefferson county filed an information against the respondent accusing him of violating the pilotage laws of the

[1]Reported in 92 Pac. 137.

state of Washington; the charging part of the information being as follows:

"The said Charles W. Ames, within one year preceding the filing of this information, in the state of Washington, in and upon the waters of the Straits of Juan de Fuca and Puget Sound, on her voyage inward and outward bound, under continuous contract for hire, the steamship 'Craighall' did wrongfully and unlawfully pilot to Port Townsend, Washington, from Port Townsend to Tacoma, and from Tacoma to Port Townsend, the said steamship then and there being a foreign vessel, to wit, the British steamship 'Craighall,' without first obtaining from the duly authorized, appointed, qualified and acting pilot commissioners for the different ports on the Straits of Fuca, Puget Sound and their branches, a valid license so to do, and without holding such license, the said Charles W. Ames then and there not being the master of the said vessel, and the said pilot commissioners for the different ports on the Straits of Fuca, Puget Sound and their branches, duly appointed, qualified and acting as aforesaid, then and now residing at Port Townsend, Jefferson county, Washington, contrary to the statutes in such cases made and provided and against the peace and dignity of the state of Washington."

To this information the respondent demurred, which demurrer the trial judge sustained, and, on the refusal of the state to plead further, discharged the defendant and dismissed the action.

We have not been favored with a brief on the part of the respondent, and consequently are not advised as to which of the several grounds upon which the information was attacked in the court below he deems controlling, hence we shall notice only those that seem to us to be the more plausible. Briefly stated, they are the following: (1) That the legislature of the state of Washington has no power to regulate pilotage on the public waters within its boundaries, since the power to so regulate is within the exclusive jurisdiction of Congress; (2) that the pilotage act is insufficient and void, since it embraces subjects not expressed in its title; (3) that

the act makes an unconstitutional discrimination between citizens of the state; (4) that the law is too indefinite to be carried into execution, since it provides different penalties for the same offense; and (5) that the act applies only to the pilotage of sailing vessels, not those propelled by steam.

Taking up these contentions in their order, the first to be noticed is the claim that Congress has exclusive jurisdiction to regulate pilotage within the public waters of the United States. This contention is true only in a limited sense. Congress undoubtedly has paramount jurisdiction to regulate pilotage in the public waters, and in so far as it has sought to exercise that jurisdiction, its acts upon the subject are supreme and supersede all state laws. But Congress has not attempted to regulate the entire subject of pilotage. So far it has confined itself to the regulation of pilotage as to vessels engaged in the coastwise or interior commerce of the country, making no provision at all as to pilotage of vessels engaged in strictly foreign commerce. The states, therefore, are free to enact laws regulating the pilotage of vessels engaged in foreign commerce, and the statute in question, in so far as it does this, conflicts with no Federal statute and is to that extent valid. It may be that it purports also to regulate pilotage on coastwise vessels. If it does, it is only inoperative to that extent. It is a valid law as to all its other provisions. *Huus v. New York etc. Steamship Co.*, 182 U. S. 392, 21 Sup. Ct. 827, 45 L. Ed. 1147. As the vessel mentioned in the information was engaged in foreign commerce the statute was applicable to her condition, and the respondent violated its provisions when he acted as her pilot without procuring the required license.

The title of the pilotage act is as follows: "An act to establish pilot regulations for the Straits of Juan de Fuca, Puget Sound, and all American waters pertaining thereto." The act contained a penal clause, and it is thought that this title is insufficient to sustain it, rendering the whole act void.

But if it be true that the title is not broad enough to include the provisions relating to the penalty, the result contended for would not follow. The penal clause only would be void, and the act would stand in the same category as other statutes prohibiting the doing of particular acts, but providing no penalty for their violation; the doing of such acts being prohibited by the general statutes as misdemeanors, punishable by imprisonment in the county jail for not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. Bal. Code, §§ 6776, 7435 (P. C. §§ 1547, 1548). But we think the title sufficient to include the penalty. The general rule under similar constitutional provisions is that a title such as the one in question is sufficiently broad to include a penalty. *Plumb v. Christie*, 103 Ga. 686, 30 S. C. 759, 42 L. R. A. 181; *Brown v. State*, 73 Ga. 38; *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922; *State v. Bailey*, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435; *State v. Karstendiek*, 49 La. Ann. 1621, 22 South. 845; *Holton v. State*, 28 Fla. 303, 9 South. 716; *People v. Kelly*, 99 Mich. 82, 57 N. W. 1090; *State v. Burgdoerfer*, 107 Mo. 1, 17 S. W. 646, 14 L. R. A. 846; *State ex rel. Harris v. Laughlin*, 75 Mo. 358; *In re Pratt*, 19 Colo. 138, 34 Pac. 680; *State v. Shaw*, 22 Ore. 287, 29 Pac. 1028.

The trial judge seems to have thought that the case of *State ex rel. Henry v. Macdonald*, 25 Wash. 122, 64 Pac. 912, from this court, lays down a contrary doctrine. But that case was rested on the doctrine that two distinct subjects were attempted to be introduced in one act, which not only were not, but could not be, included in the title. In other words, the act would have been unconstitutional had the title contained a reference to the misdemeanors therein created and made punishable. It was not intended to announce the doctrine that the legislature cannot declare an act to be a misdemeanor and provide a penalty for its violation without specially mentioning the penalty in the title of the act.

The act requires the applicant for a pilot's license to be an American citizen and legal voter of this state, and to have certain qualifications to be ascertained by the board of pilot commissioners. It is contended that the requirement that the applicant be a qualified voter unlawfully discriminates between citizens of the state. Such a discrimination, however, is not unconstitutional. *State ex rel. Griffith v. Newland*, 37 Wash. 428, 79 Pac. 983.

The penalty for a violation of the act is found in the amendatory act of February 25, 1901. Laws 1901, page 17. If any incongruity in this respect theretofore existed, it was set at rest by this amendment.

The claim that the act applies only to sailing vessels is without foundation. All vessels are included in its terms. See Bal. Code, §§ 3216-3243 (P. C. §§ 6976-7003).

Since this appeal was taken the legislature has repealed the act upon which the prosecution was founded, and we deem it proper to add that this fact does not discontinue the cause. Inasmuch as the prosecution was pending at the time of the repeal, the right to continue the prosecution is saved by the act of June 13, 1901 (Laws 1901, Extraordinary Session, p. 13).

The judgment appealed from is reversed, and remanded with instructions to reinstate the case and overrule the demurrer.

HADLEY, C. J., DUNBAR, ROOT, MOUNT, RUDKIN, and CROW, JJ., concur.

[No. 6633. Decided October 19, 1907.]

CHARLES A. ANDRUS, *Respondent*, v. COLUMBIA & OKANOGAN STEAMBOAT COMPANY, *Appellant*.[1]

CARRIERS—CARRIAGE OF GOODS—CONNECTING CARRIER—AGENCY—PLACE OF DELIVERY—LIEN FOR ADVANCES. Upon the consignment of goods to a common carrier to be carried over successive routes, the first and succeeding carriers become the agents of the owner to make delivery to the next carrier, and it is their duty to forward the goods to their destination by the usual or best route, in the absence of apparent limitation, regardless of undisclosed contracts of the consignee with respect to the shipment; and the last carrier has a lien for its charges and advances paid, regardless of the fact that by mistake or otherwise the goods were sent over the wrong route or that the consignee had a special contract with another carrier to whom they should have been delivered.

SAME—DUTY TO FORWARD—EMERGENCY. Where a consignee of a shipment of powder had a special arrangement whereby a certain carrier was to transport its goods by boat from W. to R., and such carrier sold its only boat to the only other carrier between the points stated, an emergency arises requiring the forwarding of the powder regardless of the consignee's previous contract with the former carrier.

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered August 25, 1906, in favor of the plaintiff, after a trial before the court upon an agreed statement of facts, in an action for conversion. Reversed.

Douglas, Lane & Douglas, for appellant.

Arthur P. Redman, for respondent.

DUNBAR, J.—This is an action brought by the plaintiff as the sole surviving member of the Charles A. Andrus Company, a copartnership, to recover for the alleged conversion of a car load of powder, shipped to the said company from Black River, Washington. The case was tried upon an

[1]Reported in 92 Pac. 128.

agreed statement of facts. The facts are in substance as follows:

That Charles A. Andrus and J. M. Hagerty were, at the time of the matters complained of, copartners engaged in a general mercantile business at Nighthawk, Okanogan county, Washington; that the defendant was a corporation, duly created and existing under and by virtue of the laws of the state of Washington, etc., and was a common carrier of goods operating a line of steamboats upon the Columbia and Okanogan rivers, and between Wenatchee, Brewster, and Riverside, on said rivers, and within the state of Washington; that at the time when the North Star Transportation Company sold its only boat to the defendant, said company was a corporation duly organized, etc.; that on the 15th day of April, 1903, J. M. Hagerty, one of the members of the firm of Charles A. Andrus Company, gave the freight agent of the Great Northern Railway Company at Wenatchee certain shipping instructions in writing, maked Exhibit A, and that said instructions were never revoked during the time of the matters complained of, which instructions were not known to the defendant; that on the 2d day of June, 1903, J. J. O'Connor, manager of the North Star Transportation Company, gave certain shipping instructions to A. A. Piper, freight agent of the Great Northern Railway Company at Wenatchee, marked Exhibit B, which will hereafter be noticed, said instructions being given without authority of either Andrus or Hagerty, except such implied authority as might arise from the relations of the parties; that on the 2d day of June, 1903, the North Star Transportation Company ceased to do business as a common carrier, and sold its only boat to the defendant; that since said time the defendant has been the only common carrier operating on the Columbia river between Wenatchee and Riverside, Washington; that on or about June 5, 1903, the Charles A. Andrus Company ordered six hundred boxes of powder from Schwabacher Hardware Company, of Seattle,

Washington, with instructions to ship the same to Charles A. Andrus Company in care of the North Star Transportation Company at Wenatchee, Washington; that said order was accepted when given; that said Schwabacher Hardware Company agreed to sell and ship the said goods as requested, said instructions not being known to defendant.

That on or about June 2, 1903, said Schwabacher Hardware Company, in execution of such order, shipped said powder from Black River, Washington, by delivering the same to the Columbia & Puget Sound Railroad at that place, said powder occupying an entire car; that at said Black River said railroad had no freight agent at the time this shipment was made; that no bill of lading or other instrument was ever given by said railroad for this shipment; that on the arrival of said car at Seattle, it was delivered to the Great Northern Railway, by which railroad it was billed as set out in the tag and transported to Wenatchee, Washington, where the said car arrived about June 27, 1903; that upon the arrival of said powder at Wenatchee, Washington, there were certain freight and cartage charges due; that said powder was delivered by the Great Northern Railway to the defendant; that said defendant paid said sum and took the powder, but without the knowledge or consent of said Andrus or Hagerty, and transported the same to Riverside; that the said powder has never been returned to the possession of the Charles A. Andrus Company, or to the said Andrus or Hagerty, but was held for advance charges, transportation and wharfage, and sold to satisfy the same, said sale not now being relied upon as a conversion in this action; that the said powder was delivered to the defendant by said A. A. Piper; that Riverside is the head of navigation on the Columbia river and is forty miles distant from Nighthawk, Washington; that there was at said time no telegraphic communication between Wenatchee, Washington, and Nighthawk, Washington, and that the nearest telephone station was Loomis, Washington, a

distance of twelve miles from Nighthawk, Washington, between which points a stage ran every day; that during all the time of the matters complained of Charles A. Andrus Company had an arrangement with the North Star Transportation Company by which said company was to carry all its freight at a fixed rate to the nearest practicable point to Nighthawk, Washington, to wit, Brewster or Riverside; that during all of said times the said Charles A. Andrus Company was doing business at Nighthawk, Washington, and had no place of business at Wenatchee, Washington, and that the final destination of said powder was intended to be Nighthawk, Washington; that the defendant knew where the Andrus Company's place of business was.

It is further agreed that this statement of facts shall not be construed strictly, but that any fair inference from the above facts may be drawn by the court, it being the intention of the parties to submit to the court the question of whether or not, under the foregoing statement of facts, the defendant converted said powder at Wenatchee, Washington, at or about the time mentioned in the complaint. The Exhibit A, referred to above, was as follows:

"Wenatchee, Washington, April 15, 1903.

"To the agent of the Great Northern R. R., Wenatchee, Wash.:

"Dear Sir: You will please deliver all freight consigned to J. M. Hagerty, whether billed to Wenatchee, Loomis or Brewster, to the North Star Transportation Co.

"J. M. Hagerty.

"You will also deliver all freight consigned to 'The Chas. A. Andrus Co.' to the North Star Transportation Co.

"The Chas. A. Andrus Co., per J. M. Hagerty, Pres."

Exhibit B is as follows:

"Great Northern Railway Line,

"Wenatchee, Wash., Station, June 2nd, 1903.

"To A. A. Piper, Agent Great Northern Ry., Wenatchee, Wash.:

"Dear Sir: The steamer North Star having been purchased by the Columbia & Okanogan Steamboat Company and from

this date will be operated by them, this will be your authority to deliver to the Columbia & Okanogan Steamboat Company at Wenatchee any and all freight consigned to or routed via steamer North Star or North Star Transportation Co.

"Signed, North Star T. Co., Pr. J. J. O'Connor, Mgr."

Upon this statement of facts the court found as conclusions of law:

"(1) That upon the shipment of the powder from Black River said powder became the property of the Charles A. Andrus Company.

"(2) That upon the arrival of said powder at Wenatchee the shipment thereof, as directed by said Charles A. Andrus Company, through their agents the Schwabacher Hardware Co., was completed, the shipping directions having been fulfilled and executed.

"(3) That the North Star Transportation Co. was the special agent of the Chas. A. Andrus Co. for the purpose of transporting to Brewster and Riverside by its own boat goods destined for said Chas. A. Andrus Company, and that said North Star Transportation Co. had no authority either from the Chas. A. Andrus Co. or by virtue of the circumstances to enter into a new contract of affreightment with the defendant.

"(4) That the taking and carrying of said powder by the defendant from Wenatchee to Riverside was unauthorized, and by virtue of said taking and carrying and claiming a lien thereon for said carriage the defendant became guilty of a conversion thereof."

And judgment was entered in favor of plaintiff for the amount claimed.

We think, under the statement agreed upon, that the court erred in its second conclusion of law, and that the shipping of the powder was not completed when it reached Wenatchee; for it can be gathered from all the agreed statement that it was the intention to authorize the transportation company to ship the goods to the nearest point to Nighthawk, viz., either Brewster or Riverside. In fact, paragraph 17 of the agreed statement of facts especially asserts that the plaintiffs had

no place of business at Wenatchee; that the final destination of said powder was intended to be Nighthawk, Washington.

We think also the court erred in concluding that the North Star Transportation Company had no authority, either from the Charles A. Andrus Company or by virtue of the circumstances, to enter into a new contract for the freight with the defendant. Under the circumstances of this case, there being no other transportation company that could carry the goods which the Charles A. Andrus Company had contracted for and which it was its intention and desire to have shipped to them at Riverside, the agent of said company, the North Star Transportation Company, not only had authority but it was its duty to forward the goods to their destination over the best possible route, and there was no other route and no other carrier by which they could be sent. If it did have authority, or if the Great Northern Railroad Company by reason of the authority conferred upon it by the agent of the Andrus Company, viz., the North Star Company, delivered the goods to the defendant for the purpose of transportation in accordance with the original intention of the consignor and its agent, there was no conversion of the property.

It is established law, made necessary from the character of the business, that it is the duty of common carriers to accept freight tendered by another common carrier, and that a consignor of goods to be carried over successive routes makes the first and each successive carrier his forwarding agent. This is from the necessities of the case. The consignors cannot practically travel with the goods which are shipped, and there must be some one who is responsible for transactions in regard to their shipment over the different routes. Each succeeding carrier who takes charge of the goods is responsible for the goods, and therefore becomes an agent of the consignor for the goods. It is equally well established that the last carrier has a lien for freight which he has paid to successive

carriers, and this lien is maintained even when goods have been forwarded over the wrong line and to the wrong place.

"But where, on the other hand, the owner of goods has clothed another with apparent authority to deal for him with reference to the goods, and the carrier receives the goods for such person, it is held that he is entitled to his lien. This question has most frequently arisen in cases where the last of two or more connecting carriers claim a lien upon the goods, which is disputed on the ground that the delivery to him for carriage was unauthorized. [It will be seen that that is the claim made in this case.] As has been seen, where goods are delivered to a carrier for transportation beyond his own line, he has implied authority, in the absence of an apparent limitation, to send them forward by the usual route or by any customary and proper route, and where he does so the succeeding carrier, having no notice of any limitation upon the first carrier's authority, is not to be deprived of his lien because the first carrier, by mistake or otherwise, sends the goods to the wrong place or by the wrong route." Hutchinson, Carriers (3d ed.), § 885.

The same author, on page 105, says:

"The delivery to the carrier or his agent may be made not only by the shipper in person, but also by his authorized agent. Where the owner of goods places them in the hands of an agent to secure their transportation by a carrier, the latter, in the absence of a known limitation upon the agent's authority, is justified in considering the agent authorized to exercise all the powers necessary to effect the purpose of the agency, and the acts of the agent in that respect will be binding upon the principal, as in giving directions as to the time or manner of shipment or the terms and conditions upon which the transportation is to be undertaken."

Again, on page 147:

"When goods are delivered to the carrier for the purpose of being carried to a point beyond the terminus of its route, and for that purpose to be delivered by him to a connecting carrier in order to continue the carriage, or where it becomes necessary for that purpose to make successive deliveries from one to another upon a continuous line or succession of carriers, the

first and each succeeding carrier becomes the agent of the owner to make delivery to the next carrier; and it is incumbent upon him to do so, not only to relieve himself from further liability, but because it is a duty which he owes to the owner and which he has assumed with the acceptance of the goods."

These questions were discussed by this court in *Moses v. Port Townsend Southern R. Co.*, 5 Wash. 595, 32 Pac. 488. It was there held that, where goods were delivered to a carrier for shipment to a destination beyond the route of the carrier, the freight being prepaid, such carrier became the forwarding agent of the owner, and succeeding carriers, to whom the goods were delivered by the first carrier, were not bound by the contract between the owner and the first carrier for freight charges of which they had no knowledge. This was a stronger case against the contention of the respondent than the case at bar, for there is no question in this case, under the agreed statement of facts, that the rates of shipment by the defendant in this case were any greater than they would have been by the North Star Company. In fact, it must be presumed from the agreed statement of facts that the rate was the same. In that case it was said:

"When a consignor delivers goods to a carrier to be carried over successive routes beyond the routes of the first carrier, he makes the first carrier his forwarding agent, and the first carrier who receives the goods and directs them over the route of the succeeding carrier, is the owner's agent, and the succeeding carriers act under the authority of the owner, and this has ordinarily been held to be the rule even though the first carrier did not follow the instructions of the shipper, where the succeeding carriers acted innocently;" citing many cases to sustain the test.

In this case an emergency had arisen, viz., the merging of two competing transportation companies into one. This was the practical effect of the sale by the North Star Company of its only transportation boat to the Columbia & Okanogan Steamboat Company, and it was the duty of the Great North-

ern Railroad Company, under its instructions from the North Star Company, to do what was reasonably in its power to see that freight which had been consigned to the North Star Company was properly forwarded to its destination, especially when it followed the method pointed out by the agent of the North Star Company in delivering the freight to the Columbia & Okanogan Steamboat Company. The consignors had no place of business in Wenatchee. The freight was of a perilous character, being a carload of powder. It was the bounden duty of the company in whose charge it was to forward it by the best and most expeditious conveyance to its destination. There being no showing or intimation that the Andrus Company would pay any greater amount of freight for the shipment of its goods as they were shipped than it would have paid if shipped as originally intended, it had no equitable claim to have its goods transported from Wenatchee to Riverside for nothing. The respondent, therefore, stands upon a severe legal technical right, and must bring himself squarely within the spirit of the rule of the law which he invokes. This we do not think he has done. Under all the circumstances of the case, the goods were substantially shipped according to the original intention of the Andrus Company, and the fact that they were not carried from Wenatchee to Riverside on the same boat that it was the original intention to have them carried on, or if carried on the same boat, that the boat had changed ownership, was no substantial violation of respondent's rights and in no way injured him.

The judgment will therefore be reversed and the cause dismissed.

HADLEY, C. J., RUDKIN, ROOT, MOUNT, and CROW, JJ., concur.

[No. 6706. Decided October 19, 1907.]

MILLIE PAYNE *et al.*, *Respondents*, v. WHATCOM COUNTY RAILWAY & LIGHT COMPANY *et al.*, *Appellants*.[1]

TRIAL—INSTRUCTIONS—FORM—NEGLIGENCE—DAMAGES. The court cannot be compelled to give requested instructions in any set form of words, if their substance is given in the general charge; and requested instructions as to damages from negligence and the duty of the jury toward corporations, examined and held covered in the general charge.

DAMAGES—EVIDENCE—EXPERT TESTIMONY—WEIGHT. The question of permanent injuries may be submitted to the jury upon the evidence of the plaintiff and nonexperts, although the physicians called as experts did not sustain plaintiff's contention, the weight of all the evidence being for the jury.

DAMAGES—EXCESSIVE VERDICT—APPEAL—REVIEW. A verdict for $5,000 for personal injuries, reduced by the trial court to $3,000 will not be disturbed on appeal, when sustained by the plaintiff's evidence.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered December 10, 1906, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger on a street car. Affirmed.

Newman & Howard, for appellants.

Jay C. Allen, for respondents.

DUNBAR, J.—This is an action for damages for personal injuries alleged to have been sustained by Millie Payne, one of the respondents, while a passenger on a street car in Whatcom county, on the night of July 4, 1905. The injuries were sustained at a switch, on the main line connecting the former cities of Fairhaven and Whatcom. The respondent Millie Payne was a passenger on a south-bound open car, with a step

[1]Reported in 91 Pac. 1084.

or running board extending the length of the car on each side of the seats extending crosswise. All of the seats were occupied and the respondent Millie Payne, with many other passengers, was standing on the running board, holding on to vertical bars or handholds constructed for that purpose. The north-bound car was an open car of the same character and dimensions. When the south-bound car attempted to pass the north-bound car, which had stopped too close to the switch, the running boards overlapped and Millie Payne was caught between them and sustained the injuries complained of. The exact relative positions of the cars is not material, for it is admitted that the motormen in control of the two cars were negligent, and that the company was liable for injuries actually sustained by the respondent Millie Payne; but it is denied that she was injured in the sum of $10,000, the amount sued for, or any other or greater sum than $100, which amount, together with accrued costs, it tendered into court. The cause was tried by a jury on the 14th of May, 1906, and a judgment rendered in favor of the plaintiffs, in the amount of $5,000. Thereafter defendants moved the court for a new trial, which motion was sustained, providing, however, that if the plaintiffs filed their written consent to a reduction of the amount of the verdict to $3,000, the motion for a new trial would be denied. The plaintiffs thereafter filed their written consent to such reduction. Judgment was entered in their favor for the amount of $3,000, and from such judgment this appeal is prosecuted.

It will be seen from the statement that the only questions involved are those which affect the amount of the judgment. The errors alleged are the giving and refusing to give certain instructions and the rejection of testimony. It is urged that the court erred in refusing to give the following instruction proffered by the appellants:

"You are instructed that it is your duty to try this case as fairly and impartially as though it were an action between two private persons, and it is your duty to disregard all ap-

peals made by counsel to you solely with a view to exciting your prejudice against one of the defendants because it is a street railway corporation, if any such have been made, and that while counsel have a right to criticise the testimony of the witnesses, they have no right to denounce the testimony of any witness as unworthy of credit, simply for the reason that such witness may have been in the employ of the defendant corporation, and such appeals and denunciations, if any such have been made, should be entirely disregarded by you in arriving at a verdict."

And the further instruction:

"In estimating the amount of the damages which the plaintiffs have sustained, you will not be permitted to award any greater or less sum by reason of the fact that the injuries were inflicted by the plaintiff Millie Payne having been caught between the cars of the defendant company. In other words, in estimating the damages, you should be guided by the extent of the injuries and not by the cause which inflicted them. The plaintiffs are entitled to recover no more and no less than they would be had the same injuries been inflicted in an accident in a shingle mill, saw mill, logging camp, or by an individual."

It is so well established that it is scarcely worth repeating that a court cannot be compelled to give instructions in any set form of words or language, but that when the substance of the instructions asked for, if they are proper instructions, is given, the duty of the court is ended. A recurrence to the instructions actually given by the court shows that the substance of the instructions asked for was given by the court in this case. The court among other things said:

"You are further instructed that in your deliberations upon this case it is your duty to try this case as fairly and impartially as though it were a suit between two private persons, and it is your duty to disregard all statements of counsel, made to the court in the presence and hearing of the jury upon any objections which may have been made to the introduction of testimony, or upon any argument which may have been made to the court upon any proposition of law; any-

thing the court may have said in passing upon such a proposition as was then presented, and determine this solely upon the testimony that has been offered and admitted before the court, in pursuance of the instructions which the court gives you upon the law."

In answer to objections of counsel for the appellants in relation to statements that were made by counsel for the respondents, the court said:

"The court will again instruct the jury not to be moved in their conclusion in this case by what counsel may say on either side where it is not supported by the testimony; and determine this case solely upon the testimony that was offered, and which the court admitted, and upon the instructions of the court. The jury is not to consider anything that counsel may say or the court may say in passing upon a question of law, but must decide this case solely upon the evidence that is presented to you and admitted by the court."

It would seem that the instructions of the court in this respect ought to have been satisfactory.

The third instruction complained of was given, in effect, by the court, that the damages should be compensatory and could only be based upon the actual damages shown and suffering proved. The objection is also made that the court refused the following instruction:

"The court instructs you that these actions for personal injuries are necessarily painful to the feelings, and there is often an inclination where the feelings are excited by the addresses of eloquent counsel to give more, perhaps, than in your calmer moments you would undertake to give. You are to bear in mind that your oath calls for your decision according to the evidence and that extravagant verdicts have to be set aside and the case tried over again."

Even if it should be conceded that this was a proper instruction to give, the spirit of the instruction asked was given by the court, as shown by the excerpts which we have produced.

The fifth complaint is that the court erred in refusing to give the following instruction:

"You are instructed that it will be the duty of the jury, in arriving at a verdict in this case, to be governed by the evidence in the case and the law as herein given to you, regardless of the condition of the parties hereto financially, or of the effect of your verdict upon the parties or either of them."

What we have said in reference to the instruction of the court as actually given applies also to this instruction offered. Upon all these questions an examination of the instructions impresses us with the fact that the instructions as a whole were particularly clear and fair, guarding the rights of the appellants with as much zeal as the court could be expected to exercise under any circumstances.

It is also contended that the court erred in instructing the jury that it should take into consideration aggravation of a preexisting disease, or preexisting injury to the womb. This objection is based upon the idea that there was no testimony tending to show any preexisting disease; but from the record we are satisfied there was sufficient testimony to go to the jury on this subject. It is also claimed that the court erred in submitting to the jury the question of permanent injuries and in giving instructions in regard thereto, for the reason that there was no testimony tending to show permanent injuries. The weakness of this contention lies in the fact that there was some testimony tending to prove permanent injury. It is true that the testimony of the physicians called as expert witnesses probably did not sustain this contention, but the testimony of the plaintiff Millie Payne and her co-respondent, her husband, Thomas Payne, and the testimony of other of the plaintiffs' witnesses does sustain it. The testimony of expert witnesses is not exclusive, and does not necessarily destroy the force or credibility of other testimony. The jury has a right to weigh the testimony of all the witnesses, experts and otherwise, and the same rule applies as to the weight and credibility of such testimony.

So far as the amount of the verdict is concerned, we are not convinced from all the testimony that the injury inflicted was so trifling as contended for by the learned counsel for the appellants, and perhaps not so serious as counsel for respondents paints it. But if the testimony of the respondents' witnesses, who were certainly in a position by reason of their relations with respondent Millie Payne to judge intelligently of her condition, is to be believed, the judgment awarded of $3,000 is not excessive; and considered in relation with the fact that this question was passed upon by the trial judge, who saw the witnesses and heard their testimony, we do not feel justified in disturbing the judgment.

There being no error committed in the giving or refusal of instructions, or in the admission or rejection of testimony, the judgment is affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, ROOT, MOUNT, and CROW, JJ., concur.

[No. 6728. Decided October 19, 1907.]

WILLIS H. WHITE *et al.*, *Plaintiffs*, v. JOSEPH MATZGER *et al.*, *Respondents*, DEXTER HORTON & COMPANY, Bankers, *Appellant*, and FIRST NATIONAL BANK OF SEATTLE, *Intervener and Appellant*.[1]

FRAUD—CONSPIRACY—EVIDENCE—SUFFICIENCY. Where it appears that upon a sale of real estate, the vendor, an illiterate person without any business experience, desiring a rescission of the sale, was misled by the fraudulent advice of his attorney that he was under no obligation to complete the sale, and that he could get the land back if he would make a deed to the attorney for the purpose of arranging the matter and also thereby securing the attorney's fee, there is no sufficient evidence that the vendor fraudulently colluded with the attorney to defraud certain banks, to whom the attorney

[1]Reported in 92 Pac. 341.

made a deed of the premises as security for loans, especially where the loans to the attorney for the most part already existed, or were made upon the representations of the attorney, and without any examination of an abstract of title, which would have disclosed the inability of the vendor to make the deed to the attorney.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 10, 1906, upon findings in favor of the defendants Matzger, after a trial on the merits before the court without a jury, upon issues between the defendants and an intervener as to the right to the proceeds of the sale of real property. Affirmed.

Peters & Powell, for appellant.

James Kiefer, for intervener.

Gray & Stern and *Harold Preston*, for respondents.

DUNBAR, J.—This action was brought for specific performance of a contract for the purchase and sale of real estate. The contract was made between Joseph Matzger and Etta Matzger, his wife, owners of the property, and Willis H. White, the purchaser. White subsequently assigned the contract to his coplaintiff, H. P. Craig. Subsequent to the making and execution of the above contract, Matzger and wife executed a deed of the same to defendant Jennie McCalmont, for reasons which we shall hereafter notice, who in turn conveyed to the defendant Benson, and the latter executed a deed to Dexter Horton & Company, Bankers, which deed was in fact a mortgage to secure an indebtedness due by Benson to Dexter Horton & Company, Bankers. The intervener, the First National Bank of Seattle, also claims under this mortgage. The right of White and Craig, plaintiffs, to a specific performance is not questioned in this action, the contention being that Dexter Horton & Company, Bankers, and the intervener, First National Bank, are entitled to have their claims paid first out of the purchase price. The trial court entered a decree awarding specific performance of the con-

tract to the plaintiffs, and directing that the entire purchase price be paid to the defendants Matzger; and denied any relief to either the defendant Dexter Horton & Company, Bankers, or the intervener, First National Bank of Seattle. The plaintiffs paid into court the full amount called for by the contract and remaining unpaid. That part of the judgment refusing to decree the satisfaction of the liens of the respective banks has been appealed from.

The plaintiffs, after the commencement of the action, amended their complaint and brought in Dexter Horton & Company, Bankers, by reason of the claim that it made as holder of the deed to the property from Benson. The answer of the bank is to the effect that, on the 22d day of May, it loaned to the defendant Benson and wife the sum of $3,000, for which sum the said Benson and wife, together with one C. W. Prouty, executed and delivered to it their joint and several promissory note, whereby they promised and agreed to pay in ninety days the said sum of $3,000 with interest, etc., and that at the same time, as a part of the same transaction and in order to secure the payment of the said sum of $3,000, so loaned, the defendant Benson and wife executed and delivered to it a good and sufficient deed of conveyance to lot 9, in block 49, of A. A. Denny's addition to the city of Seattle, which is the property in controversy; that the said Benson exhibited to it a deed to the said lot from Mrs. McCalmont, and that Benson represented himself to be the owner of the same; that the defendants Matzger had entered into a fraudulent conspiracy with Benson to deed the land to Mrs. McCalmont, and that, by reason of said fraudulent acts on their part, the bank had been misled as to the legal title to said lot.

The First National Bank of Seattle intervened, setting up substantially the same state of facts, claiming that it had loaned money to Benson on the strength of this deed from Mrs. McCalmont, and alleging fraudulent action on the part

of the Matzgers as the cause of their loaning the said money to Benson. These actions were denied by the Matzgers, they claiming that they had acted under the advice of Benson as an attorney, employing him to defend their legal rights, he having represented to them that they were under no legal obligation to deed the land to the plaintiffs under the contract which they had made with the plaintiff White. This action was commenced on April 26, 1906, by the filing of a complaint and *lis pendens*. The deed from the Matzgers to Mrs. McCalmont was executed March 30, 1906; the deed from McCalmont to Benson, on April 5, 1906. The deed to Dexter Horton & Company, Bankers, was made on May 22, 1906, and the loan was made on that day. The loan by the First National Bank was made on the 18th day of April, 1906. Benson, prior to the 22d of May, 1906, owed Dexter Horton & Company's bank $2,850.95, for the most of which they had his note endorsed by one Prouty on that date. They advanced Benson $149.05, and took the deed to the land in question from Benson as part security for the whole amount.

The earnest contention of the respective counsel for the two different banks is that, by reason of the alleged fraudulent conspiracy entered into between the Matzgers and Benson to prevent the plaintiff White from enforcing his contract, they were misled to their injury in extending credit to Benson. The contract entered into between Benson and the Matzgers was as follows:

"Seattle, March 30, 1906.

"For value received I hereby agree to procure from Jennie McCalmont all the right, title and interest which she this day takes from Joseph Matzger and wife; and I further agree to convey the same to Joseph Matzger and wife, on demand, in the following manner, to wit: Said conveyance to Matzger and wife shall be subject to payment in cash of my charge of one half of all said land shall be worth over and above ten thousand dollars. If I can sell same for more than the Matzgers are willing to allow as the market price, I am to have the right to pay in cash, instead of making said conveyance. This

agreement to be returned to me at the time of settlement, and to be void if made public in any manner in the meantime, by the Matzgers, or either of them. E. D. Benson."

Thereafter, as we have before indicated, Benson procured a deed to the premises from Jennie McCalmont.

The testimony in this case is not voluminous, and the whole question is whether, by reason of the fraudulent action of the Matzgers, they placed Benson in such a position that he could impose upon the bankers to their injury. Upon testifying that he had not received any consideration for the deed to Jennie McCalmont, the question was asked Matzger on cross-examination: "You executed that deed under the instructions of Benson, as a means of avoiding this contract?" The answer was:

"I went up to Benson, and Mr. — the agent who sold the property to Mr. White, came up to me and told me that he has the right to sell the property, and I says to the agent, says: 'If I can buy back the property I will pay White the $5,000,' and I went up to Mr. Benson in explaining that I want to pay to Mr. White the $5,000 as Mr. Knight has the right to sell the property. Mr. Benson told me that if Mr. White would not take the $5,000 back from me, as he had agreed to take from Mr. Craig, and Mr. Knight has got a right to sell it, he says, I would not have a right to deliver the property. I do not know what he mean. He is a good lawyer. He says: 'I know the law, that you get that property back, if you do just as I tell you. You have to have all confidence in me, and I will do what is right. I was a judge and I have the best reference.' "

He also testified that he did not know the reason why Benson wanted the deed, saying, "In truth, I did not know then what the deed means;" but that Benson assured him that he was under no legal obligation to convey the property to White; that he could tender White the $5,000 which he was willing to advance to get the property back, and that if White would not take it, they could beat him by law, and that he could not be compelled to deliver the property; that he relied

implicitly upon Benson's advice in the matter, and was simply seeking to obtain his legal rights. The cross-examination, it seems to us, did not place any different phase upon the testimony of the witness Matzger.

But even if there had been a fraudulent attempt on the part of Matzger to avoid fulfilling the contract which he had entered into with White, it seems to us that the testimony absolutely fails to show that the money loaned to Benson was loaned by either of the banks on the security of the deed to this lot. In the case of Dexter Horton & Co., it will be observed that all of the money, excepting $149.05, had already been loaned to Benson; and Mr. Latimer, who was the manager of the bank and the only witness testifying in its behalf, stated that he did not examine the title to the land. When asked if he had asked for an abstract of title at the time he took the deed, he said:

"I did not, Judge, for the reason that Judge Benson came in to see me in reference to these two notes which were then already due, and expressed a desire to get a little more money, and told me that he had just gone through with a careful examination of this property, and showed me this conveyance which had not yet been recorded, and, knowing the judge as I had for so long, I accepted the title. I was advancing without requiring an abstract."

He testified that Judge Benson had been a patron of the bank for ten or twelve years, and that he had confidence in him not only with relation to the title to the land, but of its value and future; that the increased amount was small, and that he was getting the additional names of the wife and Mr. Prouty, whom he said he considered fairly good, as an indorser on the value of this property, and for that reason, said the witness, he accepted Mr. Benson's statements. He testified that he would not have loaned him $3,000 as a primary loan on that day without having the title examined and an abstract furnished; "but," said the witness, "he offered me Mr. Prouty's and his wife's signature, in addition; and at that same time he

explained to me a sale which he had pending of his residence, with which he expected to pay all of his indebtedness at an early date."

Question: "Would you have loaned that amount of money as a new loan taking that security without an examination of the title?" Answer: "To Judge Benson alone?" Q. "Yes." A. "Oh, I don't think I would have made a new loan to Judge Benson alone without taking an abstract and examining the title, but the circumstances under which this came up, I did feel justified in accepting his statement of the title." Q. "Because he owed you the money—he already owed $2,800, and you had Prouty's endorsement already for $2,500?" A. "$2,500. But I did not have Mrs. Benson's name on either of those former notes."

And much more to the same effect.

So that it plainly appears from the testimony of the witness Latimer that this small advance of $149.05 was not made on the strength of the deed which Benson exhibited, but by reason of the fact that better security was obtained for the principal amount of the indebtedness which already existed. The same thing is true of the claim of the First National Bank. In fact, the loan was made by the First National Bank prior to any knowledge it had that the deed had been given to Dexter Horton & Company, Bankers, the latter bank having notified the First National Bank, on the day after it received this deed, that it had been informed by Benson that he wished the deed to act as security for the $3,000 which he owed to the First National Bank, as well as for security for the amount he owed to Dexter Horton & Company.

In addition to this, it seems that the loan was made or increased by the First National Bank by reason of representations that Benson had made to it that he was going to sell his residence property and some other property that he had, and that he would pay it when the sale was made, offering at the same time to sell to the president of the First National Bank his residence property. Before the banks could claim against

Matzger, it must be shown not only that Matzger had attempted to defraud, but that the action of the bank in loaning the money was caused by the fraudulent action of Matzger in the execution of this deed to McCalmont. The fact that Mr. Latimer never inquired into the value of this property, or its legal status, so far as the title was concerned, and that if he had made an examination of the record in the slightest degree, the true state of the facts would have been developed, shows that he was relying upon his faith in the statements of Benson and upon the improved position in which the bank's original claim was placed by reason of the additional security. Certainly, if sharp, shrewd business men, as bankers must of necessity be, conducting a business where security is the very life of the business, could rely, as they stated they did, upon the statements and standing of Judge Benson, this old, illiterate foreign tailor—and the testimony shows that he could neither read nor write English—unaccustomed to intricate business transactions, might reasonably be excused for relying upon statements made to him by an attorney to whom he had been recommended and who had been honored in the community by an elevation to the position of judge. The testimony of Matzger to the effect that the explanation which Benson made to him for the necessity of the deed to Mrs. McCalmont was that the deed was for Benson's protection so that he might be secure in his fee, seems to us to be reasonable.

Under all the circumstances of the case and the testimony introduced, we are satisfied that the findings of the court were correct, and the judgment is therefore affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, MOUNT, and CROW, JJ., concur.

[No. 6743. Decided October 19, 1907.]

R. O. REED, *Respondent*, v. MATT H. GORMLEY, *as Treasurer of King County, Respondent*, and HELEN MOORE HUBBELL, *as Administratrix, etc., et al., Appellants.*[1]

COUNTIES — COUNTY BOARDS — POWERS — EMPLOYMENT OF ATTORNEYS. The county commissioners are empowered to employ counsel other than the prosecuting attorney to prosecute suits on behalf of the county to secure an escheat, under Bal. Code, § 342, giving them general power to prosecute actions for the county, and Bal. Code, § 466 expressly providing that they may employ counsel other than the prosecuting attorney when they deem it for the best interest of the county.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 26, 1907, upon findings in favor of the plaintiff, in an action by a taxpayer to enjoin the payment of county warrants, after a trial on the merits before the court without a jury. Reversed.

Wright & Kelleher and *Ballinger, Ronald, Battle & Tennant*, for appellants.

Kenneth Mackintosh, R. W. Prigmore, and *Blaine, Tucker & Hyland*, for respondents.

DUNBAR, J.—This action arises out of a contract with the board of county commissioners of King county, made with one H. H. Eaton, attorney at law, by which Eaton was employed by said board in behalf of the county to conduct any proceedings necessary to secure the escheat of estates. By the terms of the contract, which it is not necessary to set forth in this opinion, Eaton was to have as compensation for his services an amount equal to one-half of the value of the estate which he procured to be escheated. In due course Eaton appeared

[1]Reported in 91 Pac. 1093.

in behalf of the county in probate proceedings upon the estate of Nellie Lawton, deceased, and secured a decree distributing the estate to the state of Washington. After such decree of distribution, appraisers were appointed as provided in the contract, and the real property thus escheated was appraised at $14,000. Eaton subsequently filed with the county commissioners his claim for $7,000 pursuant to his contract. Such claim was duly audited and allowed by the county commissioners, and fourteen county warrants for $500 each were issued to him in payment thereof. The plaintiff brought this suit as a taxpayer of King county to enjoin the payment of the warrants, alleging the invalidity of the acts of the county commissioners.

The eleventh finding of fact is as follows:

"That before making said contract the board of county commissioners consulted the prosecuting attorney of King county regarding the legality thereof, and were advised by the said prosecuting attorney of King county, W. T. Scott, Esq., in writing, that the said contract was legal and that the said board of county commissioners in making the said contract and in auditing the said claim and instructing the auditor to issue said warrants acted in good faith."

So that, so far as this case is concerned, it must be considered upon the theory that no fraud was perpetrated by the board of commissioners in entering into the contract in question, but that the contract was entered into in good faith, and for the best interests of the county according to the judgment of the commissioners. The court entered a decree enjoining the payment of the warrants in controversy, and from this decree this appeal is taken.

The question upon which this case must be decided is, did the county commissioners of King county have power to make the contract with Eaton which they did make? The contention of the respondent is that this contract was beyond the authority of the commissioners, the law making it the especial duty of the prosecuting attorney to attend to such

business as Eaton was employed to attend to; that the contract of employment could not be made without impinging upon the rights and duties of the prosecuting attorney under the law; and this view of the law was taken by the honorable trial court. An examination of the authorities and of our statutes convinces us that this was a mistaken view, and that the almost universal law in jurisdictions where the statute is similar to ours is to the effect that the county commissioners have authority to bind the county in the employment of special counsel. The announcement in the American Digest, vol. 13, Century edition, page 1469, §179, is to the effect that the county board has power to employ counsel other than the official attorney to defend the county's interests in special suits, and many authorities are cited which sustain the announcement. Many other cases might be cited to sustain the same doctrine. In *Lassen County v. Shinn*, 88 Cal. 510, 26 Pac. 365, 366, the court said:

"It is settled law that where a county has legal business to be transacted, its board of supervisors may employ counsel, other than the district attorney, to transact the business, if in the judgment of the board the public interest will thereby be subserved,"

proceeding to give many reasons to sustain the rule. In *Ellis v. Washoe County*, 7 Nev. 291, it was said:

"The only question to be determined then is, whether the commissioners possessed the authority so to bind the county. This particular power is not given in express terms, but the power 'to control the prosecution or defense of all suits to which the county is a party,' which is given in subdivision 12 of § 8, laws of 1871, clearly embraces the power to employ counsel to protect the interest of the county. Litigation can only be controlled by means of attorneys having the authority to appear in the courts; hence, to give full effect to this power, the commissioners must in the very outset have the power to employ counsel. Nor is it any answer to say that the law designates and provides an attorney for that purpose—the district attorney; for it is not unfrequently the case that he may be unable to attend to the business of the

county, or its interests in some particular suit may be of such magnitude that the assistance of other counsel would be very desirable, or possibly indispensable."

But, outside of authority and cited cases, we think the question is absolutely determined by the necessary construction to be given to the statute, and by the decisions of this court. Bal. Code, § 342 (P. C. § 4098), defines the general powers and duties of county commissioners, and subdivision 6 of such section provides:

"To have the care of the county property and the management of the county funds and business, and in the name of the county to prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law."

Under this provision of the statute, under the rule announced by this court in *State ex rel. Whitney v. Friars*, 10 Wash. 348, 39 Pac. 104; *Dillon v. Whatcom County*, 12 Wash. 391, 41 Pac. 174; *State ex rel. Sheehan v. Headlee*, 17 Wash. 637, 50 Pac. 493; *State ex rel. Porter v. Headlee*, 19 Wash. 477, 53 Pac. 948; *American Bridge Co. v. Wheeler*, 35 Wash. 40, 76 Pac. 534, the power must be held to have been granted to the county commissioners to employ counsel when they deem it necessary to subserve the best interests of the county.

But to show conclusively that it was not the legislative intent that this duty should be imposed exclusively upon the prosecuting attorney, Bal. Code, § 466 (P. C. § 4188), in enumerating the duties of the prosecuting attorney, provides that:

"Each prosecuting attorney shall be the legal adviser of the board of county commissioners for the county for which he was elected; he shall also prosecute all criminal and civil actions in which the state or his county may be a party, defend all suits brought against the state or his county, and prosecute all forfeited recognizances, bonds, and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or his county: *Provided*, The commissioners of

any county may employ other attorneys, when they may deem it for the interest of their county."

In *Martin v. Whitman County*, 1 Wash. 533, 20 Pac. 599, the power of the board of county commissioners to make contracts similar in their scope and effect to the contract in question was sustained by this court under the general provisions of § 342. It is conceded by the respondent that the law as announced in *Martin v. Whitman County* sustains the appellant's contention, but it is insisted that the scope of the law has been changed and limited by the enactment of chapter 5 of the laws of 1891, defining the duties of the prosecuting attorney, which, in effect it is claimed, did away with the proviso attached to § 466, empowering the commissioners to employ other attorneys when they deem it for the interests of their county, and that therefore the case of *Martin v. Whitman County*, which was tried before the enactment of 1891, is no longer the law of the state. In addition to the fact that the case of *Martin v. Whitman County* was not based upon the proviso attached to § 466, we are unable to discover any legislative intent in the enactment of 1891 to repeal in any manner the provisions of § 466. It not appearing that any fraud or collusion was indulged in in making the contract, the county commissioners acted within the powers conferred by law, and the court erred in restraining the collection of the warrants.

The judgment will therefore be reversed, and the cause remanded with instructions to proceed in accordance with the views expressed in this opinion.

HADLEY, C. J., FULLERTON, MOUNT, ROOT, CROW, and RUDKIN, JJ., concur.

[No. 6764. Decided October 19, 1907.]

S. M. WILLIAMS *et al.*, *Respondents*, v. ERIE MOUNTAIN CONSOLIDATED MINING COMPANY *et al.*, *Respondents*, and GEORGE ILSE, *Appellant*.[1]

CORPORATIONS—STOCKHOLDERS—ACTIONS—RIGHT TO SUE—PARTIES PLAINTIFF. In an action by stockholders of a corporation to compel a reconveyance to the corporation, the complaint is sufficient to show legal capacity of the plaintiff to sue, without any allegation that they had moved the corporation to begin suit, where it appears that the officers and a majority of the trustees were wrongdoers and in control of the corporation and that a demand for corporate action would have been useless.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 27, 1906, in favor of the plaintiffs, upon overruling a demurrer to the complaint, in an action by stockholders for the fraudulent diversion of the assets of a corporation. Affirmed.

Peacock & Ludden, for appellant.

Willis H. Merriam and *Swanson & Ripley*, for respondents.

DUNBAR, J.—This action was brought by the plaintiffs, alleging that they at one time were stockholders in the Erie Mountain Consolidated Mining Company, and that afterwards they had their stock transferred into the Erie Consolidated Gold Mining Company, in consideration of a certain agreement between the two companies by which the property of the first company was to be transferred to the second company; that the complete transfer was not consummated by reason of a fraudulent conspiracy between the officers of said company, to wit, G. S. Allison, Rufus Merriam, Willis Merriam, and the defendant George Ilse, to cheat and defraud the second company, the Erie Consolidated Gold Mining

[1]Reported in 91 Pac. 1091.

Company, in pursuance of which fraudulent conspiracy the property of the corporation was deeded by the first company, the Erie Mountain Consolidated Mining Company, to the defendant Ilse; and other allegations were made in regard to peculations of the defendants. The complaint prays for an appointment of a receiver, the judgment declaring the deed to the property null and void, and that the defendant Ilse be compelled to reconvey to the second company, and for an accounting by Rufus Merriam and Willis Merriam.

A demurrer was interposed to this complaint. The important proposition raised in the demurrer, and the only one which merits discussion here, is that the plaintiffs have no legal capacity to sue. The demurrer was overruled by the court, the defendants Merriam and Allison interposed a cross-complaint, and judgment was obtained against Ilse, to the effect that upon the return of the money that he advanced for the benefit of the property, he should redeed the same to the Erie Consolidated Gold Mining Company. The cross-complaint, in substance, alleged that the property was deeded to Ilse with the intention that it should be held in trust for the benefit of the corporation for certain reasons alleged in the complaint, which it is not necessary to set forth here, and that it was made without other consideration, and because the companies had confidence in him as trustee of the Erie Consolidated Gold Mining Company. The prayer in that complaint is that said Ilse be required to make a deed of transfer of said properties back to the defendant companies.

It is contended by learned counsel for the appellant that the demurrer of the defendant Ilse to the complaint should have been sustained for the reason that there was no allegation showing the matter had been presented to the corporation for it to act upon, and that there was no demand upon the corporation or its officers to bring suit. It may be admitted that, as a general rule, before a stockholder can be permitted to sue or defend on behalf of a corporation, he must show that

he has exhausted all means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity to his wishes, and that the managing body of the corporation has refused to sue or defend, as the case may be. This is the rule announced in 26 Am. & Eng. Ency. Law (2d ed.), p. 976 f and notes.

Ninneman v. Fox, 43 Wash. 43, 86 Pac. 213, a case decided by this court, is also cited by appellant in support of his contention. In that case the general rule was announced as above set forth. But it was especially stated in the opinion in that case that it had no reference to suits brought by a stockholder where the corporate authorities refused to act. It seems to us that the complaint in this case shows a state of facts that is equivalent to a showing that the corporate authorities or those in control refuse to act. It is alleged, concerning the deed which it had been resolved by proper action should be made out to the Erie Consolidated Gold Mining Company from the Erie Mountain Consolidated Mining Company, that Ilse, the president of the Erie Consolidated Gold Mining Company, and Willis H. Merriam, secretary and treasurer, neglected, refused, and failed to place said deed of record with the land registry office, Nelson, British Columbia, and withheld said deed from record for the purpose of cheating and defrauding the stockholders of their rights; that without notice and consent of the remainder of the board of trustees, they passed a resolution to deed all of the said property to the said George Ilse, president of the Erie Consolidated Gold Mining Company, and made a conveyance to him of all of the mining property belonging to the said Erie Consolidated Gold Mining Company as an individual, which before had been deeded to the said Erie Consolidated Gold Mining Company; that no consideration was given for said deed; that said deed included all the property belonging to said corporation, and that the said Rufus Merriam, Willis Merriam, and George Ilse have neglected and refused to allow

the stockholders or their representatives, attorneys, or agents, to inspect or examine any of the books, by-laws, deeds, receipts, or any record whatever of said companies, although they have often been requested so to do, and the stockholders have made demand and asked to be allowed to inspect said books; that by reason of such action, they were unable to give a description of the property, and unable in any way to intelligently proceed in the matter; and that from time to time they have demanded the right of parties in control of the books to inspect said books in order to know the condition of the affairs of the company, and that said right had been refused at all times to them or their legal representatives. Under this showing it seems to us that the plaintiffs have brought themselves within the exception to the general rule, and that they are practically helpless so far as any action within the corporation is concerned. The rule as announced in subd. 3, on page 978, 26 Am. & Eng. Ency. Law (2d ed.), is as follows:

"In the state courts it is generally held that a stockholder may excuse a failure to demand corporate action by showing that the persons charged with the wrongdoing, and who would be parties defendant to the action, are still in control of the corporation as directors, or that the wrongdoers control a majority of the board of directors, or by proof of any other facts which clearly show that a demand for corporate action would have been useless."

On page 967, 10 Cyc., it is said:

"This right of action arises where the majority of the shareholders in control of the corporation, are pursuing a course of action which is plainly oppressive to the minority and in fraud of their rights; where the directors and officers are acting, not in faithful discharge of their trust, but are perverting their official powers to their own personal gain and benefit, and in fraud of the rights of the shareholders; where the managers and a majority of the shareholders are diverting the assets of the corporation from their legitimate purposes to their own use and benefit; where the assets of the

corporation have been fraudulently diverted into the hands of individual shareholders."

The allegations of the complaint are too numerous to set forth in detail in this opinion, but there is certainly enough to show, if the complaint is true, that the assets of the corporation have been fraudulently diverted into the hands of individual shareholders, and that the officers are not acting in any faithful discharge of their duties, but are performing their official powers to their own personal gain and benefit; and such showing is made here as ought to empower a court of equity to act in the premises. We think the other objections to the complaint are untenable, and that no error was committed by the court in any of the matters complained of. From an investigation of the testimony, we have reached the conclusion that the facts found by the court were justified by the record, and it is immaterial whether the facts found were based upon the testimony offered in support of the original complaint or the cross-complaint.

The judgment rendered metes out substantial justice in the case. It is therefore affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, ROOT, MOUNT, and CROW, JJ., concur.

[No. 6776. Decided October 19, 1907.]

THE CITY OF SEATTLE, *Respondent*, v. GEORGE C. SAULEZ *et al.*, *Appellants*.[1]

INDEMNITY—JUDGMENT—CONCLUSIVENESS—NOTICE TO DEFEND. A judgment against a city for damages from the negligence of a contractor, who had agreed to save the city harmless therefrom, is conclusive against the contractor where he had notice to defend, as to the amount of damages, the existence of the defect, and want of negligence on the part of plaintiff in the former case.

SAME—DEFENSES TO ACTION—BARRIERS REQUIRED BY CONTRACT—WAIVER BY CITY INSPECTOR. Where a contractor has agreed with a city to erect barriers over street excavations and save the city harmless from accidents resulting therefrom, he cannot excuse the failure to erect barriers by the fact that a city street inspector was present and gave no directions as to the erection of barriers.

SAME — JUDGMENT — ADMISSIBILITY AS EVIDENCE — PERSONS NOT NOTIFIED. In an action by a city against an indemnity company to recover over the amount paid on a judgment for personal injuries, the judgment is admissible in evidence for the purpose of showing that it had been recovered against the city for damages for failure to keep the streets in repair, although the surety company was not notified to appear and defend the action.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 30, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon a contractor's bond. Affirmed.

Walter S. Fulton, for appellant United States Fidelity and Guaranty Company.

G. T. Bogue and *McBride, Stratton & Dalton*, for appellants Saulez & Dooley.

Scott Calhoun and *Elmer E. Todd*, for respondent.

[1]Reported in 92 Pac. 140.

DUNBAR, J.—This is an action upon a contractor's bond. The contractors, Saulez and Dooley, on the 30th day of April, 1903, entered into a contract with the city of Seattle for the planking of Howell street and Eastlake avenue, agreeing, among other things, that they would erect and maintain good and sufficient guards, barricades, and signals at all unsafe places at or near where the work contemplated therein was to be done, and to indemnify and save harmless the city of Seattle from all suits or actions brought against the city for or on account of any injuries sustained by any one by reason of the failure of said contractors to erect or maintain such guards, barricades, or signals. Briefly, these barricades were not all erected, and one B. H. Peterson, while driving a team, was injured by reason of the defect in the streets, and obtained judgment against the city in the sum of $1,250. This judgment was afterwards on appeal sustained by this court, and the case is reported in *Peterson v. Seattle*, 40 Wash. 33, 82 Pac. 140. The contractors, Saulez and Dooley, were notified of the pendency of the action of Peterson against the city, but the appellant United States Fidelity and Guaranty Company received no notification of such suit. The city paid the judgment with some increased costs, and brought this action to recover from the contractors and their sureties the amount so paid. The case was tried before the Honorable R. B. Albertson, one of the judges of the superior court of King county, without a jury, and judgment was rendered against the contractors and their surety for the amount prayed for.

In the trial of this cause the judgment in the cause of *Peterson v. Seattle* was offered in testimony by the city, and received by the court over the objection of the appellants. So far as appellants Saulez and Dooley are concerned, it is unquestioned that the judgment in the case of *Peterson v. Seattle* is conclusive against them as to the amount of damages sustained by Peterson, the existence of a defect in the street, and that Peterson could not be charged with negli-

gence. But it is contended that the judgment roll in the *Peterson* case is not conclusive as to the question whether the negligence causing the injury to Peterson was the negligence of the city of Seattle or that of the contractors, it being contended that the city inspector was on the ground during the time the work was in progress and gave no directions as to the erection of any barricades or barriers, and seemed to be satisfied with the condition of the streets; and further, that the erection of barricades would have closed the street to traffic, and that it was really for the benefit of the city that the barricades were not erected. This contention we think cannot be sustained under the contract and the evidence in this case. The contractors having agreed with the city to erect and maintain good and sufficient barriers and save the city harmless, it was their plain duty to do so unless they were released by the city from that obligation, and no testimony tending to show a release by the city was offered. It was not incumbent upon the city to stand over the contractors and demand of them that each respective condition of the contract should be complied with, but it had a right to rely upon the contract and presume that its conditions would be fulfilled. The judgment against the appellant contractors is unquestionably correct.

The appellant the United States Fidelity and Guaranty Company urged that the court committed error in admitting in evidence against it the judgment roll in the case of *Peterson v. Seattle*, for the reason that it had no notice of the trial of that cause and was therefore not bound by the judgment. Even though the appellant's contention may be correct, that the judgment will not bind it so far as the merits of the case are concerned, it could properly be admitted for some purpose, under the rule announced by this court in the case of *Curtley v. Security Savings Society*, 46 Wash. 50, 89 Pac. 180. The judgment was competent to prove certain issues of the case, viz., that the judgment had been rendered against the city in an action for damages for failure to keep the streets in safe condition.

On the question of the liability of the guaranty company which had no notice of the suit against the city, the authorities are in sharp conflict, some courts holding that a judgment against the principal debtor cannot be admitted as evidence against the surety who has not been notified of the prior suit, while a good many, and perhaps a majority of the modern decisions, are to the effect that, when one is responsible by force of law or by contract for the faithful performance of the duty of another, a judgment against that other for failure in the performance of such duty is prima facie evidence in a suit against the party so responsible for that other. But whatever may be the weight of authority or of reason on this proposition, we are satisfied from an investigation of the record that the testimony in *this* case was sufficient to establish all the material allegations of the complaint under the rules of law announced by this court in *Peterson v. Seattle, supra.*

The judgment will therefore be affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, ROOT, MOUNT, and CROW, JJ., concur.

[No. 6778. Decided October 19, 1907.]

B. C. CLAUSON, *Appellant*, v. P. A. LAWRENCE *et al.*, *Respondents*.[1]

APPEAL—REVIEW—DISCRETION—VACATING DEFAULT. The opening of a default for the purpose of permitting a trial on the merits is within the discretion of the trial court, and will not be disturbed in the absence of abuse thereof.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 14, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action on contract. Affirmed.

R. L. Edmiston, for appellant.

B. M. Branford, for respondents.

DUNBAR, J.—This is an appeal from a final judgment of dismissal, and costs against appellant, and from certain orders made during the trial. This is an action for damages for an alleged breach of contract. The appellant and respondent P. A. Lawrence, in the month of October, 1904, entered into an oral agreement, by the terms of which said P. A. Lawrence was to furnish certain sums for the purchase of a certain tract of land, situated in Idaho, and appellant was to open and maintain a suitable office in the city of Spokane, Washington, for the sale of said land, and to personally devote his time and best efforts to that end; that Lawrence was to receive the first proceeds of the sales made from said tract of land, until he should be fully reimbursed for all the money invested by him, and that afterwards appellant was to receive one-half of the profits which might be realized over and above the sum to be paid to said Lawrence as aforesaid, in

[1]Reported in 91 Pac. 1087.

consideration of the services which said appellant agreed to render in opening and maintaining an office, and using his best efforts in selling said described tract of land.

The court found from the testimony that, in pursuance of said agreement, Lawrence purchased the said tract of land and performed his part of the agreement; that on or about the 1st day of December, 1904, the plaintiff abandoned the office which he had occupied during the time of the negotiations and making the above-mentioned agreement; that after the sale of a small portion of said land, to wit, on or about January 1, 1905, the plaintiff, voluntarily and without cause, or consent on the part of defendants or either of them, abandoned the said contract and agreement, and entered into and engaged in other business wholly foreign to, and inconsistent with, said agreement, and utterly failed and neglected to open or maintain any office at all for the sale of such real estate, and failed to sell, or make any effort to sell, such tract of land or any part thereof, and abandoned and wholly failed to perform his part of the agreement, voluntarily and without any cause, or consent on the part of said defendant; that the defendants were not indebted to the plaintiff in any sum whatever; and concluded, as a matter of law, that said plaintiff voluntarily abandoned and rescinded the aforesaid agreement on the 1st day of January, 1905, and thereby ended the same, and thereby ended and determined any and all obligations of the said defendants to the end and by virtue of the contract; that there was nothing due from the said defendants to the plaintiff under and by virtue of the contract, and that the defendants were entitled to a judgment of dismissal of the action and for all lawful costs expended. Certain findings of fact which were essentially opposite in matter of statement to the findings found by the court were suggested by the appellant, and refused by the court.

Judgment in this case had been taken against the respondents by default. This judgment was afterwards vacated on

motion of the respondents, and it is strenuously urged by the appellant that the court erred in vacating the default judgment, and granting the defendants permission to answer. A motion of this kind is so particularly addressed to the discretion of the trial court, who is familiar with all the circumstances of the case, that the appellate court will be slow to interfere with the orders of the trial court, unless it should appear that substantial injustice had been done by an abuse of discretion. Especially is this true where the order of the court does not permanently deprive the plaintiff of any substantial right, but simply has the effect of submitting his case to a trial on the merits. The record convinces us that there was no abuse of discretion in vacating the judgment.

On the merits there seems to be no particular principle of law involved. If the findings of the court are correct, the judgment should undoubtedly be sustained. But if the findings proposed by the appellant are justified by the evidence, the judgment is wrong. The action is not one for an accounting as is asserted by appellant, but is an action for damages for breach of contract. Viewed in either aspect, we are satisfied that the findings of the court are justified by the testimony, and the judgment is therefore affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, ROOT, MOUNT, and CROW, JJ., concur.

[No. 6926. Decided October 19, 1907.]

THE STATE OF WASHINGTON, *on the Relation of J. H. Davis, Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, Respondent.*[1]

STATUTES — AMENDMENTS — CONSTRUCTION — STATES — OFFICERS — TERM OF OFFICE — INCREASE OF SALARY. Laws of 1907, amending the law of 1901, relating to the state board of control, "so as to read as follows," does not repeal the provisions in the former (omitted from amendment) fixing the term of office and the time for the beginning thereof, where it was evident that the intent of the amendment was to change the salary and a few of the duties, and to deal with an existing office, not to create a new one; hence the salary of a member of the board under the old law cannot be increased during his term of office as fixed thereby, although he was reappointed on the taking effect of the amendment before his old term had expired.

Application filed in the supreme court September 13, 1907, for a writ of mandate to the state auditor to compel the issuance of a warrant increasing the salary of a member of the state board of control. Denied.

Vance & Mitchell, for relator.

The Attorney General, and *A. J. Falknor, Assistant*, for respondent.

DUNBAR, J.—The plaintiff is a member of the state board of control, having been originally appointed to said office under the laws of 1901. He was appointed on April 1, 1905, for a full term of six years, and filed his bond and oath of office at that time, and at all times since has been a duly acting and qualified member of the state board of control. The legislature of 1907 passed an act, chapter 166, amending the act of 1901 in relation to the board of control. In said act the salary of the members of the board of control was raised from $2,000, as it was established under the act of 1901, to

[1]Reported in 91 Pac. 1089.

$3,000 per annum. The governor, acting upon the theory that under the provisions of the act of 1907 there should be a reconstitution of the board, appointed the relator to the office of member of the board of control on the 12th day of June, 1907. The relator deeming that he was entitled to the salary provided for under the act of March, 1907, presented his bill for the amount which would be due him under said act; but the defendant, the state auditor, has refused to honor the requisition, insisting that he should pay only $2,000 salary under the old act by reason of the fact that the relator was a member of the board of control at the time of the passage of the new act.

It is the contention of the relator that that provision of the law of 1901 which prescribed the time at which the term of office begins, having been repealed and not having been brought forward into the amendatory act, is no longer the law, and that consequently the provisions of the new act required a reconstitution of the board by the executive, whose terms take effect from the time of the constitutional operation of the new law. The facts are undisputed. Section 1 of chapter 119 of the Laws of 1901 is as follows:

"The governor of the state shall, by and with the advice and consent of the senate, appoint a bi-partisan board consisting of three citizens of the state, not more than two of whom shall belong to the dominant political party, as members of the board to be known as the 'state board of control.' The members of said board shall hold office, as designated by the governor, for two, four and six years respectively and be removable by the governor in his discretion. Subsequent appointments shall be made as provided and, except to fill a vacancy, shall be for a period of six years. The chairman of the board for each year shall be the member whose term of office first expires. All vacancies that may occur on said board while the legislature is not in session shall be filled by appointment by the governor and shall be submitted to the senate for consideration at the next session following the appointment. Each member of the said board shall receive a salary of two thousand dollars ($2,000) per annum, and in

addition shall be paid for all actual expenses incurred in discharge of his duties, said expenses not to exceed the sum of one thousand dollars ($1,000) per annum for each member of the said board."

Section 1 of the amendatory act is an exact duplicate of § 1 of the original act of 1901, excepting that it provides that each member of the board shall receive a salary of $3,000 instead of $2,000. Section 3 of the act of 1901 provides that the board of control shall assume its duties on April 1, 1901. Section 3 of the 1901 act commences as follows:

"The board of control shall assume its duties on April 1, 1901, and shall have full power to manage and govern the Western Washington Hospital for the Insane, Eastern Washington Hospital for the Insane, the State Penitentiary, State Reform School, the State Soldiers' Home and the State School for Defective Youth, subject only to the limitations contained in this act," etc.

The amendment is as follows:

"That section three (3) of said act be amended to read as follows: Sec. 3. The state board of control shall have full power to manage and govern the following public institutions;"

and then proceeds to mention the same institutions that are mentioned in the original act; and the provisions of the sections are the same, excepting that the amendatory act gives the board of control the custody and control of the state capitol buildings and grounds, with certain powers over them that had theretofore been exercised by another state officer, and gives them certain supervision over the University of Washington and the normal schools of the state. The other sections amended are, in all practical respects, the same as the original sections, except in relation to the amount of salaries which are to be paid subordinate officers, and the expenses incurred by the members of the board of control, and minor details.

The provisions of our constitution bearing on this subject

are as follows: Section 25 of art. 2 provides that the compensation of any public officer shall not be increased or diminished during his term of office. Section 25 of art. 3 provides that the compensation of state officers shall not be increased or diminished during the term for which they shall have been elected. Section 13 of art. 4 provides that judges of the supreme court and judges of superior courts shall, at stated times during their term of office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election nor during the term for which they shall have been elected. This provision is not in point excepting to show the intention of the framers of the constitution in relation to the changing of the salaries of any kinds of officers in the state. Section 8 of art. 11 provides that, "the salary of any county, city, town or municipal officer shall not be increased or diminished after his election, or during his term of office." So that it will be seen that it was a positive policy of the constitution, expressed in every possible way, that the salaries of officers should not be increased during their term of office. This wise provision was no doubt intended to prevent pernicious activity on the part of the office holders of the state being brought to bear upon the members of the legislature—a wise provision which must not be construed out of existence or evaded by legislative enactment.

The relator invokes the doctrine announced by Sutherland on Statutory Construction (2d ed.), § 247, that, where an act is amended or a section by the use of the words "so as to read as follows," and the substituted provision is inserted without specification of the changes intended to be made, the parts of the former law left out are repealed, and that inasmuch as § 3 is amended without providing for the commencement of the term of the office, the legislative intent was clear to abolish the office and establish a new office by the reenactment. The rule contended for, of course, is the general rule; but

the true intent of the legislature must be gathered from the whole scope of the enactment and the reasons which appear for making the enactment. In this case, instead of the omission tending to show the legislative intent to establish the commencement of the term at some future time, the fact that no future time was mentioned or fixed shows that the legislature did not intend to create a new office, but understood that it was legislating with reference to an office already in existence, and with reference only to certain material changes which it desired to make in the law. The amendment to §3 shows clearly that the only change intended was the change in regard to salary.

This question has been passed upon by this court in *Mudgett v. Liebes*, 14 Wash. 482, 45 Pac. 19, and while the contention in that case was the opposite of the one in this, viz., that an officer could be deprived of the salary which attached to his office at the time he was elected, by subsequent repealing legislation, the principle announced was the same. In that case Sutherland on Statutory Construction, 134, was cited, where it was said that:

"Where there is an express repeal of an existing statute and a reenactment of it at the same time, or a repeal and a reenactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time. . . . Offices are not lost; corporate existence is not ended; inchoate statutory rights are not defeated; a statutory power is not taken away, nor criminal charges affected by such repeal and reenactment of the law on which they respectively depend."

And the case of *State ex rel. Blossom v. Horton*, 21 Nev. 300, 30 Pac. 876, was approvingly quoted, where it was said:

"The effect of an amendment of a statute made by enacting that the 'act is hereby amended so as to read as follows,' and then incorporating the changes or additions with that portion of the former act that is retained, is not that the portions of the amended act which are merely copied from the original

act are to be construed as having been repealed and again re-enacted. The part which remains unchanged is to be considered as having continued to be the law from the time of its first enactment."

The whole amendatory act convinces us that it was not the intention of the legislature to create a new office or to abolish in any manner the provisions of the act in relation to the commencement of the term of office, but that it was simply the intention to amend the law in respect to the amount of the salary and with respect to the added powers and duties which it was deemed wise to impose upon the board of control.

We think the case falls plainly within the inhibition of the constitution in relation to increasing the salary of public officers, and that the auditor was justified in refusing to issue the warrant.

The writ will be denied.

HADLEY, C. J., RUDKIN, ROOT, MOUNT, and CROW, JJ., concur.

[No. 6999. Decided October 28, 1907.]

THE STATE OF WASHINGTON, *Appellant*, v. CHEHALIS FURNITURE & MANUFACTURING COMPANY *et al.*, *Respondents*.[1]

MASTER AND SERVANT—PAYMENT OF WAGES—STATUTORY REGULATION. Laws 1905, p. 219, making it unlawful to issue orders or checks in payment of wages unless redeemable at face value, "without discount, in cash or on demand," and providing that when an employee shall cease to work, he shall be "forthwith paid in cash or by order redeemable in cash at its face value on presentation," is not violated by the issuance of a due bill dated March 16, 1907, reciting "Due G. G. Pickett or order on 4-15-1907 (meaning April 15, 1907), eight dollars for wages," and by refusal to pay the same on demand, where it does not appear that the laborer had ceased to work; since the first part of the statute is complied with by issuance of the order payable in cash, and the last part requires payment on demand only when the laborer has ceased to work.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered May 4, 1907, in favor of the defendant, upon sustaining a demurrer to the information, dismissing a prosecution for the violation of the statute relating to the payment of wages. Affirmed.

Maurice A. Langhorne (*A. J. Falknor*, of counsel), for appellant.

Millett & Harmon, for respondents.

DUNBAR, J.—The defendants in this action were informed against for a misdemeanor. The information, omitting the formal part thereof, was as follows:

"That the above named Chehalis Furniture & Manufacturing Company, a corporation, duly organized and existing under and by virtue of the laws of the state of Washington, having its principal place of business at Chehalis, Lewis county, Washington, and H. B. Coffman, secretary and man-

[1]Reported on 92 Pac. 277.

ager of said corporation, being engaged in the manufacture of furniture and other articles of a like kind and employing labor therein to assist in the manufacture of furniture and other articles, did commit the crime of issuing for payment of wages, a check for labor employed in said manufacturing company's factory, which check was not negotiable and redeemable at its face value without discount in cash or on demand at the place of business of such corporation and individuals as follows, to wit: that the said Chehalis Furniture & Manufacturing Company, a corporation, and H. B. Coffman, then and there at Chehalis, Lewis county, Washington, being engaged in the manufacture of furniture and other articles, and then and there having in their employ as a laborer for wages one G. G. Pickett, did on the 3d day of March, 1907, issue to him, the said G. G. Pickett, in payment of his wages for labor performed in said manufacturing establishment, a check in the following words and figures, to-wit:

"Chehalis Furniture & Mfg. Co.; Chehalis, Wash., 3-16, 1907. No. 3158.

"Due $8.00

"G. G. Pickett or order on 4-15, 1907 (meaning April 15, 1907),

"Eight Dollars for wages from Mch. 190.. to ..... 190..

"Chehalis Furniture & Mfg. Co.,

"(Signed) H. B. Coffman, Secretary.

"Endorsed: G. G. Pickett, W. E. Bartel, Fred Cain."

"That said check was endorsed by said G. G. Pickett to W. E. Bartel, who in turn endorsed the same to Fred Cain; that said check was thereafter, on the 29th day of March, 1907, duly presented to the said Chehalis Furniture & Manufacturing Company, a corporation as aforesaid, and H. B. Coffman, secretary and manager of such corporation, for payment, at the place of business of such corporation and individual at Chehalis, Lewis county, Washington, and payment thereof was by said parties wrongfully and unlawfully refused on the ground that said check was not due until April 15, 1907; and that presentment was also made of said check at said time to Coffman, Dobson & Co., Bankers, at Chehalis, Lewis county, Washington, the bankers of said parties, and payment of said check at said time by said bank was also unlawfully and wrongfully refused unless the payee thereof would accept the

amount of said order with discount, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state of Washington."

The information was demurred to on the ground, among others, that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court, and the state appeals.

With the view we take of this proposition, it is not necessary to notice the other grounds of demurrer. The statute upon which the information was based is chapter 112 of the Laws of 1905, page 219, which is as follows:

"Section one of 'An act to provide for the payment of wages of labor in lawful money of the United States and to punish violations of the same,' approved February 2, 1888, is hereby amended to read as follows: Section 1. That it shall not be lawful for any corporation, person or firm engaged in manufacturing of any kind in this state, mining, railroading, constructing railroads, or any business or enterprise of whatsoever kind in this state, to issue, pay out or circulate for payment of wages of any labor, any order, check, memorandum, token or evidence of indebtedness, payable in whole or in part otherwise than in lawful money of the United States, unless the same is negotiable and redeemable at its face value, without discount, in cash or on demand, at the store or other place of business of such firm, person, or corporation when the same is issued, and the person who, or company which may issue any such order, check, memorandum, token or other evidence of indebtedness shall upon presentation and demand redeem the same in lawful money of the United States. And when any laborer performing work or labor as above shall cease to work whether by discharge or by voluntary withdrawal the wages due shall be forthwith paid either in cash or by order redeemable in cash at its face value on presentment at bank, store, commissary, or other place in the county where the labor was performed: *Provided*, Such order may be given payable in another county when the place of employment is more convenient of access to the employee."

It will be seen that the first part of this section was not violated if the statement of the information is true, for the rea-

son that the check given was to be paid in lawful money of the United States, and it was negotiable and redeemable at its face value without discount in cash. The evident intention of the legislature in passing this law was to prohibit the pernicious habit which had theretofore frequently been indulged in by factories of different kinds of paying the laborers in checks which were only redeemable in goods which were to be furnished by the company stores. To this check, as we have seen, this objection could not be raised. The second or concluding proposition in the statute is to the effect that when a laborer shall cease to work whether by discharge or voluntarily, he shall be entitled at once to receive the value of the services which have been performed, and shall not be compelled to await the process which it is convenient for corporations sometimes to adopt in the payment of wages to their employees. The object of this statute was to protect the laborer from the necessity of remaining around in the neighborhood where he had been employed, and waiting on expense the payment of wages which he had already earned. But the information does not bring the case within this view of the law, for it is not alleged that the laborer Pickett had ceased to work at the factory, either by being discharged or by voluntarily stopping work, or at all. Hence, there was no violation of the statute in this regard.

The honorable judge of the superior court did not commit error in sustaining the demurrer to the information, and the judgment is therefore affirmed.

HADLEY, C. J., ROOT, MOUNT, CROW, RUDKIN, and FULLERTON, JJ., concur.

[No. 6642. Decided October 28, 1907.]

WILLARD W. HINDMAN, *Respondent*, v. AMBROSE FRED COLVIN *et al.*, *Appellants*.[1]

MORTGAGES—FORECLOSURE—CORPORATIONS—INSOLVENCY—PARTIES—RIGHT TO INTERVENE. Upon an action to foreclose a mortgage upon leasehold estates held by an insolvent corporation, and the appointment of a receiver for the corporation, the lessors of the property in question, who had claims against the corporation and had commenced an action to forfeit one of the leases for nonpayment of rent, in which the receiver had intervened, are not entitled to intervene in the foreclosure suit, and defend against the notes and mortgage as fraudulent, as they are simple contract debtors of the corporation without interest in the subject-matter of, and unaffected by, the foreclosure suit, they not having reduced their claims to judgment or proved the same before the receiver.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered January 21, 1907, denying the petitioners motion for leave to intervene and defend an action to foreclose a mortgage. Affirmed.

Vance & Mitchell and *J. W. Robinson*, for appellants.

James T. Bircham, for respondent.

CROW, J.—This action, in which applications for writs of prohibition and mandamus have heretofore been made to this court (46 Wash. 317, 89 Pac. 894), was commenced in the superior court of Thurston county, by W. W. Hindman, trustee, against the Great Western Coal Development and Mining Company, a corporation, to foreclose a mortgage on certain coal mining interests, personal property, and leasehold estates. The defendant entered its appearance, and one George P. Cragin was appointed its receiver. The several leasehold estates covered by the mortgage were upon certain large tracts of land belonging to various owners who were

[1]Reported in 92 Pac. 139.

lessors. When the foreclosure proceedings were instituted and the receiver was appointed, there was pending, in the superior court of Thurston county, cause No. 3303, wherein Ambrose Fred Colvin and Anna Colvin, husband and wife, Rosa Colvin and Thomas Colvin, minors, by Thomas Ismay, their guardian *ad litem*, and Thomas Ismay as an individual, were plaintiffs, and the Great Western Coal Development and Mining Company and others were defendants, brought for the purpose of forfeiting one of the leases held by the defendant.

Upon his appointment, the receiver, George P. Cragin, with leave of court, intervened in said cause No. 3303 and proceeded to defend against any forfeiture of such lease. Afterwards on August 29, 1906, the said Ambrose Fred Colvin, Anna Colvin, his wife, Rosa Colvin and Thomas Colvin, minors, by Thomas Ismay, their guardian *ad litem*, and Thomas Ismay individually, filed in this foreclosure action an application for leave to become parties and defend against the mortgage of the plaintiff, W. W. Hindman, trustee. Attached to, and filed with their application, was the affidavit of Thomas Ismay, made on behalf of himself and all the other petitioners, in which, with other facts not necessary to be here stated, he, in substance, alleged that said cause No. 3303 was then pending and undetermined; that the mortgage held by the plaintiff Hindman as trustee was without consideration, fraudulent, and void; that the petitioners were creditors of the defendant corporation, the Great Western Coal Development and Mining Company, holding claims for rentals under their lease, and also various other claims, in the total sum of $2,300; that the corporation was insolvent, and that they should be permitted to defend against the plaintiffs' alleged fraudulent mortgage notes. The petitioners had not reduced their own claims to judgment, had not obtained any liens therefor on the mortgaged property, had not made any proofs thereof, nor had they filed the same with the receiver for an allow-

ance. As to such indebtedness, alleged to be due them, they only appeared to be simple creditors of the corporation. The trial court denied their motion for leave to become parties and defend, and they have appealed.

The substance of the appellants' contention seems to be that, as simple contract creditors of the defendant corporation, they have, by intervention, under Bal. Code, § 4846 (P. C. § 272), the statutory right to become parties to this action and defend against the notes and mortgage of the respondent Hindman, trustee, which they allege to be fraudulent, and that they have such right without first reducing their own claims to judgment and obtaining liens thereunder, or proving and filing the same with the receiver for allowance. To entitle them to intervene under said section, their interest in the matters in litigation must be so direct and immediate that they will either gain or lose by the direct operation or immediate effect of the final judgment which may be entered in this action. This court, in *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, an action similar to this, said:

"Numerous other creditors of the Huron Lumber Company, who had not obtained judgments and had no liens, and were simple contract creditors, were allowed to file so-called interventions, and the cause was then kept waiting until they could sue at law and obtain judgments, when they came in again and filed supplemental complaints. This, under the statute and the authorities, was wholly irregular. Under a statute exactly like ours, the supreme court of California, in the leading case of *Horn v. Volcano Water Co.*, 13 Cal. 62, held that a simple contract creditor of a common debtor could not intervene in a foreclosure suit."

In the case of *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569, cited in the above quotation, the plaintiff was seeking to foreclose a mortgage executed and delivered to the defendant corporation, when certain creditors intervened, alleged fraud in the execution of the mortgage, and contended that it was void as against creditors of the corporation. In

passing upon the right of such creditors to intervene and defend, Mr. Justice Field, speaking for the supreme court of California, said:

"The petition of the creditor, Rawle, does not disclose any right on his part to intervene; it shows that he was a simple contract creditor, holding obligations against the company—but it does not show that any portion of them was secured by any lien upon the mortgaged premises. His intervention is only an attempt of one creditor to prevent another creditor obtaining judgment against the common debtor—a proceeding which can find no support, either in principle or authority. The interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. . . . To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation. No such claim or lien is asserted in the petition of Rawle, and his right to intervene must, in consequence, fail."

To the same effect see, also, *Smith v. Gale*, 144 U. S. 509, 12 Sup. Ct. 674, 36 L. Ed. 521; *Lombard Inv. Co. v. Seaboard Mfg. Co.*, 74 Fed. 325; *Vanmeter v. Fidelity Trust & Safety-Vault Co.*, 107 Ky. 108, 53 S. W. 10; *Harlan v. Eureka Mining Co.*, 10 Nev. 92; *Dickson v. Dows*, 11 N. Dak. 407, 92 N. W. 798.

These appellants cannot be bound, nor will they gain or lose any rights, by the final decree or judgment that may be entered for or against the respondent Hindman, trustee, in this foreclosure suit to which they are not parties. If they in fact hold valid claims against the defendant corporation, they can by proper procedure have all their rights protected, but as long as they occupy the position of simple contract creditors, holding alleged claims which are not liens on the mortgaged property and which they have not proved or filed with the receiver, they cannot apply for any remedy or relief

in this foreclosure action by intervention, nor are they entitled as a matter of right to become parties herein for the sole purpose of defending against the claims of the respondent Hindman, trustee.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, DUNBAR, and MOUNT, JJ., concur.

[No. 6952. Decided October 28, 1907.]

CHARLES NEESON, *Appellant*, v. JAMES SMITH *et al.*, *Respondents*.[1]

MORTGAGES—DEED AS MORTGAGE—CONTRACT TO RECONVEY—VENDOR AND PURCHASER—OPTIONS—CONDITIONAL SALE. Where a mortgagor deeds the mortgaged property to the mortgagee, who surrendered the notes, cancelled the mortgage, took possession of the property, giving back an agreement to reconvey to the mortgagor for a certain sum at any time within two years, leaving it optional with the mortgagor to repurchase the same, the deed is absolute and not a mortgage, as the relation of debtor and creditor ceases to exist; and the agreement to convey is an option that expires at the time fixed, and not a conditional sale, although alluded to as such, and time was not made of its essence.

VENDOR AND PURCHASER—CONDITIONAL SALE—FORFEITURE—ACQUIESCENCE IN. After the time for completing a conditional sale had expired, a sale to a third person, not objected to for five years, constitutes a forfeiture of the conditional sale, acquiesced in by the purchaser.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 8, 1907, in favor of the defendants, after a trial on the merits before the court without a jury, in an action for specific performance, and for damages. Affirmed.

[1]Reported in 92 Pac. 131.

W. H. Abel (*Chas. W. Smith*, of counsel), for appellant.

J. A. Hutcheson, C. W. Hodgdon, and *J. B. Bridges*, for respondents.

Crow, J.—This action was commenced by Charles Neeson against James Smith and Mary A. Smith, his wife, Lytle Logging & Mercantile Company, a corporation, and others, for specific performance and damages. The evidence shows that the plaintiff, Neeson, from January 19, 1891, to December 4, 1896, inclusive, executed and delivered to the defendant James Smith five promissory notes, for a total of $9,400, secured by mortgages on four different tracts of real estate, in Chehalis county, which we will severally designate as, the Montesano lots, the Chehalis River timber land, the Hoquiam River timber land, and the Cosmopolis land.

In July and August, 1898, Smith commenced foreclosure on all of the mortgages; but before answer, and on August 13, 1898, he and Neeson entered into a written contract of settlement, whereby it was stipulated that the amount then due Smith was $8,274; that Neeson should convey all the lands to Smith, who should cancel and surrender all the notes and mortgages; that Neeson should, at his election, have two years within which to repurchase any or all of the lands, upon payment of the agreed valuations hereinafter stated, with eight per cent interest thereon; and that, upon the execution of the deed by Neeson, the defendants Smith and wife should execute and deliver to Neeson an agreement to reconvey the lands, or any of them, upon such payments being made. Thereupon the plaintiff executed and delivered to the defendant James Smith a warranty deed for all of the lands; and the defendants Smith and wife, under date of August 13, 1898, executed and delivered to the plaintiff Neeson a written contract, acknowledged on October 5, 1898, reading, without descriptions, as follows:

"This Agreement, made this 13th day of August, 1898, by and between James Smith and Mary A. Smith, his wife,

parties of the first part, and Charles Neeson, party of the second part, all of Montesano, in Chehalis county, state of Washington.

"WITNESSETH—That first parties for and in consideration of the sum of one dollar in hand paid by the second party, receipt of which is hereby acknowledged, and other valuable considerations, moving from second party to first parties, do by these presents for themselves, their heirs, representatives and assigns, covenant and agree to sell and convey to second party his heirs or assigns, by good and sufficient warranty deed or deeds, with the usual covenants at any time on or before two years from this date, to-wit, the 13 day of August, 1898, any or all of the following described tracts of land, situated in Chehalis county in the state of Washington, at the election or elections of second party, for the respective sums of money herein specified, payable in cash at the date each purchase is completed, on or before two years from this date, as follows, to wit: They covenant and agree to sell and convey, as aforesaid, [the Montesano lots]; with the buildings now thereon unless destroyed by fire, for the sum of nine hundred dollars ($900.00), with interest thereon from this date until such purchase is completed, by second party, at the rate of eight per cent per annum, simple interest. They covenant and agree to sell and convey, as aforesaid [the Chehalis River timber land] for the sum of Five Hundred Dollars, with interest thereon from this date until such purchase is completed, at the rate of eight per cent per annum simple interest. They covenant and agree to convey, as aforesaid, [the Hoquiam River timber land] for the sum of six thousand six hundred and twenty-four dollars ($6,624), with interest thereon from this date until such purchase shall be completed, at the rate of eight per cent per annum, simple interest. They covenant and agree to sell and convey, as aforesaid, [the Cosmopolis land] for the sum of one hundred and fifty dollars, with interest thereon from this date until such purchase shall be completed at the rate of eight per cent. per annum, simple interest.

"In witness whereof, first parties have hereunto set their hands this 13th day of August, 1898.

"James Smith,
"Mary A. Smith."

On August 13, 1898, the last day of the two years named in the agreement, Neeson paid to Smith $580, and received a deed for the Chehalis river timber land. At no time within the two years did he tender any further purchase money, or demand a deed to any other lands. On July 15, 1903, Smith and wife sold to Neeson the Cosmopolis river land for $150, conveying the same by a quitclaim deed, which was prepared by an attorney employed by Neeson and contained the following recital:

"It being an intention hereby to convey to party of the second part all of the right, title and interest in and to said lands, which said parties of the first part acquired from party of the second part by virtue of a certain deed bearing date on or about August 13, 1898, executed by party of the second part to James Smith, and this deed being made pursuant to a contract of even date with said deed and of record in the office of the auditor of Chehalis county."

Neeson claims that this language constitutes a recognition of the continuance of his rights under the written agreement. The defendant Smith alleged and testified that these words were fraudulently inserted in the deed at the instance of Neeson; that the deed was not read to him, and that he would not have executed it had he known that it contained such recitals.

In December, 1900, about four months after the expiration of the time mentioned in the agreement, Smith and wife sold the Hoquiam river timber lands to the defendant Lytle Logging & Mercantile Company for $5,000, which they allege was its then reasonable value. Neeson learned of this sale shortly after it was made, but took no action to assert any further rights under the contract until the time hereinafter mentioned. Shortly after the expiration of the two years, Smith, to the knowledge of Neeson and without objection from him, made improvements to the value of three or four thousand dollars on the Montesano lots. About October 20, 1905, Neeson for the first time tendered payment to Smith, and demanded deeds for the Hoquiam River timber lands and the

Montesano lots. Smith refused to convey, contending that Neeson had no further interest, and on August 11, 1906, only two days less than a period of eight years after the date of the contract, Neeson commenced this action to compel specific performance and recover damages. Other facts not material to be here stated were pleaded and proven. The trial court made no formal findings of fact, but filed the following written opinion:

"In this case I hold that the deed made by Neeson to Smith was an absolute conveyance of the lands described therein in satisfaction and payment of the indebtedness due from Neeson to Smith, and the agreement executed by Smith and wife to Neeson was simply an option given to Neeson under which he could purchase the different tracts described therein on the conditions specified, and when the option expired he lost all rights under it. The option expired absolutely in the two years from its date. The conveyance by quitclaim of the tract which Smith afterwards made to Neeson was a mere matter of grace on the part of Smith and could not have been enforced. Smith did not thereby recognize, and had no intention of recognizing that Neeson had any right to demand such conveyance under his option."

From a judgment in favor of the defendants, the plaintiff has appealed.

The appellant's first contention is that, after August 13, 1898, the relation of mortgagor and mortgagee continued between him and the respondent Smith; that such relation still continues, and that he is entitled to redeem. In deciding whether any deed or other written instruments constitute an equitable mortgage, the principal test is whether the relation of debtor and creditor between the parties has continued after their execution and delivery. *Plummer v. Ilse*, 41 Wash. 5, 82 Pac. 1009. At the time the contract above mentioned was executed by Smith and wife, Neeson conveyed the lands to Smith by warranty deed; whereupon Smith surrendered all the notes, cancelled the mortgages, dismissed the foreclosure actions, took possession of the realty, and has since paid all taxes upon the land. This discharged Neeson's indebtedness,

and no new indebtedness against him was created. Under these facts, the relation of mortgagor and mortgagee ceased to exist, and Smith acquired an absolute title to the land. *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61; *Dabney v. Smith*, 38 Wash. 40, 80 Pac. 199.

Appellant further contends that the contract of August 13, 1898, acknowledged by Smith and wife in October, 1898, if not a mortgage, was a contract of sale, and that as it did not expressly provide that time was of its essence, his rights as a purchaser would continue thereunder until a forfeiture was claimed and enforced by Smith; that no forfeiture has been declared; that the respondent Smith is in no position to claim the agreement was an option, as he himself frequently referred to it in his answer as a conditional sale contract.

It is utterly immaterial that the respondent so alluded to the contract, as he alleged facts sufficient to show that it was only an option. The honorable trial judge arrived at the correct conclusion in holding that it was an option, and that appellant's right to tender payment and demand a deed expired on August 13, 1900. While it is true that the agreement obligated the respondents Smith and wife to sell to the appellant any or all of the lands within a period of two years, it will also be noted that the appellant was not required to take any of such lands, although he might at his option do so, at the prices stated and within the period named. To this extent the contract was unilateral. An obligation whereby one party, for a valuable consideration, binds himself to sell at a fixed price within a certain time, but makes it discretionary with the other party to purchase, being a contract by which the vendor stipulates that the proposed vendee shall have the right to buy at such fixed price and within such certain time or not, at his election, is in law an option. 6 Current Law, 1784; *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011; *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723; *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. 17.

There is a marked distinction between a contract of sale and an agreement for an option. This distinction is well stated in *McMillan v. Philadelphia Co.*, 159 Pa. St. 142, 28 Atl. 220, in the following language:

"The distinction between an option and a contract of sale or lease is broad and plain. An option is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell or lease his land, if the holder elects to accept them within the time limited. If the holder does so elect he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract. If an acceptance is not made within the time fixed the owner is no longer bound by his offer and the option is at an end. A contract of sale or lease fixes definitely the relative rights and obligations of both parties at the time of its execution. The offer and the acceptance are concurrent, since the minds of the contracting parties meet in the terms of the agreement."

The agreement involved in this action being a contract for an option, the appellant had no rights thereunder after the expiration of the two years, unless he had, within that time, elected to take the property, had tendered the purchase money, and had demanded a deed, which it is not contended he did. The authorities generally hold that time is material in a contract for an option, and that it is not necessary to expressly stipulate that it shall be of its essence. Mr. Pomeroy, in § 807, vol. 6, of his late work on Equity Jurisprudence, says:

"It has at times been suggested that relief for slight failure where there was substantial compliance should be applied to options to purchase land, as where the holder of the option was a day late in exercising the option. But it is clear the rule followed generally by equity is the true one,—that there can be no relief against a failure to exercise an option after the day named for its expiration, for an option is no more than an offer to sell which the offerer is bound to keep open during the time set, but which expires with that time, leaving nothing for equity to operate upon. The courts very frequently refuse to give specific performance of an option sought to be exercised after the time has expired on the

ground of time being of the essence. Strictly speaking, there is no contract if the election is not made before the expiration of the time, and equity finding no contract to use its discretion upon, cannot be concerned with the element of time, which presupposes an existing contract."

See, also, 2 Page, Contracts, § 1166; *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 480; *Ranelagh v. Melton*, 2 Drewry & Smale, 278; *Stembridge v. Stembridge's Adm'r.*, 87 Ky. 91, 7 S. W. 611; *Woods v. McGraw*, 127 Fed. 914; *Potts v. Whitehead*, 20 N. J. Eq. 55.

It is not contended that the appellant, at any time within the two years, tendered the purchase money, or demanded a deed either for the Hoquiam river lands or for the Montesano lots now involved in this action. This being true, all of his right to become a purchaser of such property ceased by lapse of time on August 13, 1900, and he is not entitled to now demand a specific performance, or damages for any alleged failure of the respondents to convey. Were we to conclude that the agreement under consideration was not an option, but a contract of sale in which time was not of the essence, even then the appellant could not recover. His own evidence shows that he had knowledge of the sale of the Hoquiam river timber land to the Lytle Logging and Mercantile Company almost immediately after it was made, and that he asserted no further claim to the land for about five years thereafter. This sale made by respondents constituted a forfeiture of the contract on their part, in which forfeiture the appellant, by his subsequent conduct, acquiesced. *Moran & Co. v. Palmer*, 36 Wash. 684, 79 Pac. 476.

The respondents have pleaded, and by their evidence clearly sustained, the equitable defense of laches; but in view of what we have heretofore said, it will not be necessary to discuss such defense.

The judgment is affirmed.

Hadley, C. J., Dunbar, Mount, Rudkin, Fullerton, and Root, JJ., concur.

[No. 6942. Decided October 28, 1907.]

Lee Mantle, *Respondent*, v. Joseph B. Dabney, *Appellant*, Louise E. Dabney, *Defendant*.[1]

Appeal—Decision—Retrial—Amendments. Upon the reversal of a case and remand for a new trial, it is not error for the trial court to refuse to allow the answer to be amended, in a respect which would be inconsistent with the original answer and testimony of the defendants and the theory on which the case was first tried.

Bills and Notes—Mortgages—Actions—Conditions Precedent—Conflict of Laws. Foreclosure of security is not a prerequisite to an action in this state upon a note made in Montana, secured on property in California, under the statutes of Montana requiring foreclosure of a mortgage before any resort to the note secured thereby.

Appeal—Exceptions. Error cannot be predicated on the exclusion of evidence where no exception was taken to the ruling.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 21, 1907, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

John C. Hogan, for appellant.

W. H. Abel, *A. M. Abel*, and *Chas. W. Smith*, for respondent.

Root, J.—This case was here once before, and may be found reported in 44 Wash. 193, 87 Pac. 122, to which reference is made for a statement of the facts out of which the action arose. After the remittitur reached the lower court, the appellant, Joseph B. Dabney, made a motion for leave to amend his answer by pleading a section of the statute of California, showing that the husband had control and management of the community property, and also by pleading that he was authorized by his wife to make the agreement whereby

[1]Reported in 92 Pac. 134.

the deed to certain California property was retained by Mantle and Hodgens for the security of the note herein sued on. The trial court refused to permit said amendment, upon the ground that it had no discretion, but under the decision of this court, must enter a judgment against said defendant. From the judgment thereupon entered, this appeal is prosecuted.

In the matter of allowing amendments, much latitude is permitted under our statutes; and we are not prepared to say that there could not be conditions justifying an amendment after a case was remanded as was this. But under the circumstances here found, we do not think that any error was committed by the court in its refusal. That part of the proposed amendment alleging that appellant's wife consented to the giving of the security is inconsistent with the answers of both appellant and wife and with the evidence and theory of the case as presented upon the first trial. The California statute, if pleaded, would not constitute a defense to the action. The Montana statute is as follows:

"Sec. 1290. There is but one action for the recovery of debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such actions the court may, by its judgment, direct a sale of the encumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remain due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien upon the real estate of such judgment debtor, as in other cases on which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the

judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action."

We do not think this statute can have the effect of making a foreclosure upon the security in California a prerequisite to an action upon the note in this state.

It is also urged by appellant that he should have been permitted to offer evidence in support of the offset pleaded in his affirmative defense. Respondent asserts in his brief that this defense was stricken by the trial court and no exception to the ruling reserved by appellant. It is claimed in appellant's brief that no such ruling was ever made. The statement of facts upon the first appeal shows that respondent's counsel, upon the trial, stated that said defense had theretofore been stricken. His statement was not challenged. This, with the fact that the trial court gave no attention to such defense, would indicate that it had been stricken. It not appearing that any exception was taken to such ruling, we are not authorized to review the same.

The judgment is affirmed.

HADLEY, C. J., RUDKIN, CROW, MOUNT, and FULLERTON, JJ., concur.

[No. 6834. Decided October 29, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Ora E. Wilson et al., Appellant*, v. THE SUPERIOR COURT FOR CHEHALIS COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN—PUBLIC USE—RIGHT TO CONDEMN—LOGS AND LOGGING. Condemnation by a boom company of ten feet along the banks of a stream, for the purpose of driving logs by means of artificial freshets, is a public use, although the company had only driven logs for one timber company, whose officers and stockholders were the same as those of the boom company, where it appears that four or five hundred million feet of timber was tributary to the stream, and it was not shown that it all belonged to one company.

SAME—LOSS OF RIGHT—NONUSER. The right of condemnation by a boom company is not lost by nonuser of its franchise, for the term of eight months, as provided by Bal. Code, § 4393, where it appears that during such time its dams were operated by a timber company, under a lease, and no public demand made upon it was refused during such time; as nonuser is not thereby established.

SAME—PROCEEDINGS—PREREQUISITES—ATTEMPT TO AGREE. Where condemnation proceedings are contested on the ground that the petitioner has no right to condemn, it is immaterial that there was no attempt to agree upon the amount of compensation for the property taken.

Certiorari to review a judgment of the superior court for Chehalis county, Irwin, J., entered May 27, 1907, after a hearing on the merits, adjudging a public use, etc., in an action to condemn the waters of a stream for logging purposes. Affirmed.

W. H. Abel, for relators.

J. B. Bridges, for respondents.

HADLEY, C. J.—A writ of review was issued in this cause for the purpose of reviewing the action of the superior court of Chehalis county in certain condemnation proceedings. The

[1]Reported in 92 Pac. 269.

petitioner asking condemnation is the Wynooche Driving Company, a corporation organized under the laws of this state to improve rivers and streams for the purpose of driving logs and timber products thereon. In the articles of incorporation it is particularly declared that the corporation intends to engage in said business on the Wynooche river and its tributaries in Chehalis county in this state. The petition avers that, by reason of its powers in the premises, the petitioner has cleared out and straightened what is known as Black creek, which is a tributary to the Wynooche river in said Chehalis county.

It is further alleged that the creek flows through certain described lands which belong to the defendants in the condemnation proceeding; that the petitioner has heretofore constructed and operated, and that it desires in the future to operate certain dams for the purpose of holding and storing the waters of said stream above said lands. The purpose of storing the waters is that the same may be periodically released and thereby create in the creek below artificial freshets for the purpose of driving logs and other timber products. It is alleged that during the freshet season of the year the stream is navigable for the floatage of logs and other timber without the aid of artificial freshets, but that during other seasons it is not so navigable, and that artificial freshets are necessary to make the stream commercially more valuable, and in order that logs may be driven during all seasons of the year; that an extensive and valuable tract of timber is tributary to the stream, and should be floated down the creek by means of both natural and artificial freshets as aforesaid into the Wynooche river, and thence to the market; that logs are continually being placed in the creek and consigned to the petitioner to be driven down, and that it is necessary in order for the petitioner to perform its duties as required by law, that it shall operate said dams and create said artificial freshets; that in driving the stream by means of the freshets, small

portions of the banks are liable to wash away, and that it is also necessary for the employees of petitioner at times to go upon the banks of the stream in order to break jams formed by the logs and to pole and drive them down; that for said purpose it is particularly necessary that the petitioner shall have vested in it the right to go upon a strip of land ten feet in width adjacent to and parallel with the westerly and northerly bank of said creek as it runs through the aforesaid lands, public necessity requiring the appropriation of the said right for the aforesaid purposes.

A preliminary trial was had for the purpose of determining if the contemplated use is a public one. The court found the facts to be substantially in accordance with the averments of the petition as above stated, and held that the contemplated use is a public one constituting a public necessity. A judgment was entered appropriating the right to create, by means of dams, artificial freshets in the stream where the same passes the said lands, such freshets not, however, to overflow the banks of the stream; also the right to drive logs and other timber products consigned to the petitioner down the stream and past the said lands by means of said artificial freshets; also the right of the petitioner, through its officers, agents, and employees, to go upon said strip of land ten feet in width, for the purposes aforesaid. On the application to this court by the defendants in the condemnation proceeding, the writ of review was issued to review said judgment.

The chief contention of the relators is that the court erred in finding the contemplated use to be a public one in view of the evidence. It is urged that the evidence shows the use to be for the private benefit only of the Frank H. Lamb Timber Company, a corporation. The officers and stockholders of the timber company and the driving company are the same. But the identity and purposes of the two corporations are entirely distinct and different. The timber company exists for ordinary commercial purposes for the private benefit of its stock-

holders, and owing no duty to the public other than is due from other trade corporations similarly organized. The driving company although owned and directed by the same persons as the timber company, has, nevertheless, by virtue of its organization under the laws of this state, assumed certain duties and obligations to the public similar to those of a common carrier. Its identity as a public service corporation places upon its officers and owners duties entirely different from those of the same persons in the other corporation. Up to the time of the trial, the only timber shown to have been floated down the steam was placed therein by the timber company, and for a time the latter operated the dams and drove its own timber. This was, however, by a lease arrangement with the driving company, the owner of the lands, whereby the timber company was to operate the dams and drive the timber placed in the stream, paying the driving company a stipulated price for the privilege. But at the time the condemnation proceeding was commenced, the driving company was itself operating the dams and driving all the timber.

Inasmuch as the only service heretofore rendered by the driving company has been for the timber company, and inasmuch as the testimony did not affirmatively show that there are other timber owners tributary to the stream, the relators argumentatively draw the conclusion that the only services which the driving company can or will render must be in behalf of the timber company, and that the use sought is therefore a private one, being for the benefit only of the persons who are the stockholders of the two corporations. The testimony shows that there is probably from four hundred to five hundred million feet of timber tributary to the stream, and in the absence of testimony affirmatively showing that such a large body of timber is all owned by one owner, we think it should not be presumed that it is so owned. The testimony is silent as to the ownership of the timber, although relators' counsel was present and cross-examined the witnesses. When it was shown that so large a tract of timber is tributary to this

floatable stream, we think it followed as a conclusion that this duly organized and authorized driving company, in seeking to operate upon the stream, must do so as a servant of the public. The public may demand the services of the corporation since it is a quasi public corporation. As a condition of its existence, it must handle all logs and floatable timber which any individual or corporation may consign to it. The right to condemn is determined by this right of the public to demand the services so as to make necessary the appropriation sought. Such is the test, rather than the extent to which the right will be exercised by the public. *State ex rel. Ami Co. v. Superior Court*, 42 Wash. 675, 85 Pac. 669.

It is assigned that it was error not to hold that the driving company has lost by nonuser its right to condemn. This contention is based upon the fact heretofore stated that the operations upon the stream were for a time turned over to the timber company, and also by reason of the statute as found in Bal. Code, § 4393 (P. C. § 7126), as follows:

"Should any corporation neglect, for the period of eight months after improving any stream or river, to operate its dams, or to otherwise perform its duties as herein provided, then all rights herein conferred to such corporations upon such streams or rivers, or portions thereof, shall cease."

During the time the timber company was operating, it did so as the lessee of the driving company. It was engaged in driving its own logs, and no others were placed in the stream during the time it so operated. The public made no demand which was refused, and the dams and the stream were operated by the driving company through its lessee and agent. Such facts do not establish nonuser. In *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, it was held that where a railway company had leased its line of road to another corporation and neither operated its road nor possessed any rolling stock of its own, it was not thereby deprived of the power to condemn private property.

It is objected that the court erred in finding that the petitioner and the owners had been unable to agree as to the amount of compensation to be paid for the property rights sought to be appropriated. In *State ex rel. Skamania Boom Co. v. Superior Court, ante* p. 166, 91 Pac. 637, we held that when a defendant in a condemnation proceeding takes the position that the petitioner has no right to condemn, the question of inability to agree as to compensation thereafter becomes immaterial. Such being relators' position here, it is immaterial what the court found upon that subject.

The judgment is affirmed, and the trial court is directed to proceed to ascertain the amount of compensation to be paid.

FULLERTON, RUDKIN, DUNBAR, MOUNT, CROW, and ROOT, JJ., concur.

[No. 7005. Decided October 29, 1907.]

W. E. INMON *et al.*, *Respondents*, v. JAMES H. PEARSON *et al.*, *Defendants*, JOHN P. WOOD *et al.*, *Appellants*.[1]

BOUNDARIES—LOCATION OF CORNERS. The law establishes an obliterated corner where the surveyor actually located it, and not where it ought to be located by a correct survey.

SAME—AGREEMENT AS TO LOCATION—ESTOPPEL. An agreement for the reestablishment of a lost corner does not estop the party from objections to its location pursuant to the agreement when all the conditions of the agreement had not been carried out.

SAME — BOUNDARIES — EVIDENCE—HEARSAY. Hearsay or general reputation is admissible to establish the location of a lost or obliterated boundary line or corner.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 17, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to establish a lost corner. Affirmed.

[1]Reported in 92 Pac. 279.

W. H. Abel, for appellants.

J. B. Bridges, for respondents.

DUNBAR, J.—This was an equitable action to establish a lost corner which determined the boundary line between the adjoining lands of the parties to this action, and was prosecuted under Bal. Code, § 5667 (P. C. § 3285). The appellants denied that the corner was lost or obliterated, and set up, as an affirmative defense, that an agreement between the respondents and the appellants had been entered into, and a survey had been made under such agreement, whereby the corner had been conclusively established. This matter was pleaded as an estoppel. Trial was had to the court without a jury. The court held that the affirmative matter and estoppel were not a defense, and granted the plaintiffs relief by establishing the corner at the point at which they claimed the corner had been established. Prior to the establishment of the corner by one Frazier, the corner had been established by one Shorey, a surveyor, at the point contended for by the appellants, and still prior to that time another attempt had been made to establish the corner by another surveyor, which did not seem to satisfy any of the parties. In the opinion of the court it is said:

"I have no doubt that the corner in dispute in this case should have been established where the Shorey survey has located it and where the defendants are contending for, but I am satisfied from the evidence that the government surveyor located it at the point where the plaintiff is contending for, and that is the corner which has been recognized by the residents of the vicinity for years. Surveys have been made from that corner, roads and fences have been built with reference to it. The law establishes the corner where the surveyor actually locates it, rather than where it ought to be located by a correct survey."

This, we think, was a correct statement of the law. And we also think from a careful examination of the testimony that the statement of facts contained in the opinion of the court was fully justified. The court found that the plaintiffs should

not be estopped by reason of the agreement preceding the Shorey survey, and under the testimony we think that this finding was also justified; that all the conditions of the agreement had not been carried out.

Hearsay evidence was introduced to prove the establishment of the corner at the point contended for by the respondents, which evidence was objected to by the appellants, and the admission of this evidence is one of the errors assigned in this case. It may be conceded that the general rule is that hearsay testimony cannot be admitted to prove a fact in issue. But it is contended by the respondents that the establishment of corners or boundaries is an exception to the rule, and that boundaries may be proven by hearsay testimony and by reputation. This, we think, is undoubtedly the law. The general rule is that hearsay testimony is incompetent, yet cases of boundaries constitute an exception. In England such evidence was held inadmissible in the case of disputed boundary between private individuals. In the United States hearsay evidence is admissible both upon questions of boundary affecting public rights and also in the case of disputes as to boundaries between private land owners. 4 Am. & Eng. Ency. Law (2d ed.), 850 to 858. This rule is also laid down by Greenleaf on Evidence, § 170, and many American cases are cited which sustain the text. In *Boardman v. Reed*, 6 Pet. 328, 8 L. Ed. 415, the supreme court of the United States, speaking through Mr. Justice McLean, said:

"That boundaries may be proved by hearsay testimony, is a rule well settled; and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Landmarks are frequently formed of perishable materials, which pass away with the generation in which they are made. By the improvement of the country, and from other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries; . . ."

This, in fact, seems to be the universal American rule, and it seems to us, is a just if not a necessary rule in the establishment of ancient boundaries. We may say in this connection that the original government survey was made by one Byles in 1857, and that Byles again made the survey in this locality in 1873, establishing the corner, according to the testimony, at the point contended for by the plaintiffs. This seems to be about the only legal question raised in this case, it being entirely a question of fact which was presented to the court.

We have carefully examined all the testimony in this case, and while there is a great conflict of testimony, rendering the proposition somewhat uncertain, we think, with the court, that the weight of the testimony was to the effect that the corner was originally established at the point where it was decided to be so established by the court, and are not inclined to disturb the findings of the court in that respect.

The judgment is affirmed.

HADLEY, C. J., ROOT, MOUNT, RUDKIN, CROW, and FULLERTON, JJ., concur.

[No. 6840. Decided October 29, 1907.]

N. G. WHEELER *et al.*, *Respondents*, v. THE CITY OF ABERDEEN *et al.*, *Appellants*.[1]

APPEAL—DECISION—REVERSAL—SCOPE OF NEW TRIAL. An objection that a complaint does not state a cause of action cannot be first raised by objection to any testimony at the second trial of the case, after a reversal by the supreme court of the first judgment, entered under the same complaint.

SAME—LAW OF CASE. Where, on a former appeal by a city, the supreme court reversed the case for error at the trial, holding that the city was liable for unnecessarily destroying property, and awarded a new trial to determine that question, the decision becomes the law of the case; and the objection cannot be raised that

[1]Reported in 92 Pac. 135.

the city was not liable for acts done in the exercise of a governmental function, there having been no attempt to correct the former decision on that question, which was raised in the briefs on the former appeal.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 29, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for the negligent destruction of a building and injury to the contents. Affirmed.

J. B. Bridges, John C. Hogan, and *R. E. Taggart,* for appellants.

J. C. Cross and *J. W. Robinson* (*A. Emerson Cross,* of counsel), for respondents.

DUNBAR, J.—This action has once before been in this court, and is reported in 45 Wash. 63, 87 Pac. 1061, where an extended statement of the facts and issues may be found. For certain reasons therein expressed, the judgment of the lower court was reversed and the cause remanded for another trial. The case was again tried before a jury upon the same pleadings. A verdict in the sum of $500 was rendered in favor of the plaintiffs. Judgment was rendered, and from this judgment this appeal was taken.

Briefly, the complaint alleged that the plaintiffs were owners of a certain wooden building in the city of Aberdeen, and were conducting therein a store; alleging the value of the stock and the value of the building, and that on or about the 10th day of October, 1905, the defendants, against the wishes and protests of the plaintiffs, wrongfully and unlawfully and with force entered upon said premises, tore down said building and drove the plaintiffs therefrom, and in so doing greatly damaged the materials of which such building was erected, and also damaged the stock of goods and fixtures that were therein.

The answer alleged, that prior to the tearing down of the building there had been a fire in the city of Aberdeen; that thereafter fire limits had been established; that the plaintiffs' building in question was constructed within the fire district unlawfully, by reason of its not being the character of building which was permitted in such district; admitted the tearing down of the building; but alleged that it was torn down after ample notice to the plaintiffs; that the defendant Lindstrom was the mayor of the said city, and the defendant Birmingham was its acting marshal at the time of the destruction of the building. In the former trial of the case the court permitted the plaintiffs to recover damages upon various grounds, but upon appeal to this court it was held that the only ground upon which the plaintiffs could recover damages was upon the theory that the defendants had negligently and carelessly torn down said building and negligently and carelessly damaged and injured the stock of goods, and the cause was sent back for a trial upon those issues. Upon the second trial, the court eliminated all testimony which did not bear upon the damage which had ensued by reason of negligently and carelessly tearing down the building, and testimony was offered to that effect, which we think sustained the judgment in this regard.

At the commencement of the taking of the testimony on the second trial, the defendants objected to the taking of any testimony in the case, for the reason that the same would be incompetent, irrelevant, and immaterial, and that the complaint did not state a cause of action. When the plaintiffs rested their case, the defendants asked for a nonsuit, which was denied. Several assignments of error are set forth in appellants' brief, the first of which we will notice, viz., that the complaint did not state a cause of action. There was no demurrer interposed to the complaint, and this objection was not raised at the former trial either in the court below or upon the trial in this court, and under the uniform rulings of this court it is too late to raise that question now. In *Dennis v. Kass &*

Co., 13 Wash. 137, 42 Pac. 540, and since reaffirmed by this court, it was said:

"The point is now made by the appellants that the complaint does not state facts sufficient to constitute a cause of action. This is the same complaint upon which the former case was tried, and if it does not state facts sufficient to constitute a cause of action, that question should have been raised upon the former trial. The policy of the law is opposed to a multiplicity of actions, and it would be directly in conflict with such policy to allow a party to raise one objection and litigate that, not only in the court below, but in the appellate court, and if the result should be against him, to go back and raise another objection which he might have raised on the former trial. Under such a practice there would be no end to litigation."

Such has been the uniform holding of this court, and we see no reason to depart from that doctrine.

The main contention urged by the appellants in this action is that the city was not liable for negligence under any circumstances; that the city and its officers were engaged in the exercise of governmental functions, when it was enforcing compliance with its valid ordinances, and that therefore there could be no liability for damages. It is urged in this case that, under that doctrine, the city in any event could not be held liable, and that therefore the judgment against the city must necessarily be reversed. The court below held, that this question was not available to the defendants by reason of the decision of this court in the former case; that the cause had been sent back for trial against all the defendants on certain issues therein specified, and that it was the law of the case that the defendants were all liable for negligence in tearing down the building. The language of this court in the cause above referred to, after holding that the defendants were not liable for anything other than inexcusable negligence by reason of that question having been determined in injunctive proceedings which had theretofore been brought and which judgment had not been appealed from, said:

"The only damages which we think the respondents would

be permitted to recover in this action are such as were needlessly inflicted by the appellants in unnecessarily rendering worthless the material of which the building was constructed, and in unnecessarily destroying or rendering less valuable the furniture, fixtures, and merchandise. Upon a new trial of this action, recovery for such damages should be permitted if sustained by the evidence." *Wheeler v. Aberdeen*, 45 Wash. 63, 87 Pac. 1061.

It is contended by the appellants that the court evidently did not mean what it said in the use of this language, for the reason that it is well established and has been so held by this court, that the city in the performance of its governmental functions cannot be held liable for damages. But this question was squarely raised by the former brief of the appellants, as will be seen by consulting page 25 of such brief, where it is said:

"There is another question in the case which seems to us to be controlling. The city and its officers were engaged in the exercise of governmental functions when it was enforcing compliance with its valid ordinances by tearing down the plaintiffs' building, and there could be no liability for damages in any event,"

citing cases to sustain their contention.

It is true that there was very little discussion on that proposition indulged in by the attorney for the appellants in his brief, and there may not have been any in oral argument, our recollection not serving us in that respect. But the point was there raised, and the court must have decided against the appellants on that proposition, or it would have been illogical for the court to have sent the cause back for trial against all the defendants to determine the amount of damages claimed, by reason of the needless infliction thereof by the appellants in unnecessarily rendering worthless the material in the building in question. Whether right or wrong, a question which we do not now decide, the ruling of this court in that respect became the law of the case, which is a branch of the law of *res adjudicata*. This ruling was against the interests of the

city, notwithstanding the judgment was reversed in its favor. There was no attempt to call this question to the attention of the court, or to have the judgment amended, by petition for rehearing in that case, and under all authority this court will not now enter into an examination of the questions which were adjudicated at the former trial.

"If the facts disclosed by the record now before us are substantially the same as those presented by the record on the first appeal the former decision of this court established the law governing this case, and was a final adjudication and determination of the question now under consideration." *Furth v. Snell*, 13 Wash. 660, 43 Pac. 935.

In *Tyler v. Magwire*, 17 Wall. 253, 284, 21 L. Ed. 576, the court said:

"Brought here as the cause is by a second writ of error, it is settled law in this court that nothing is brought up for re-examination and revision except the proceedings of the subordinate court subsequent to the mandate,"

quoting approvingly from *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969, where it was said:

"But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to needless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinion. . . ."

To the same effect is *Sizer v. Many*, 16 How. 98, 14 L. Ed. 861, and many other cases unnecessary to be set forth here. And the rule of the state courts is in harmony with this view.

What is said by the appellants in regard to the refusal of the court to render a verdict against a part of the defendants falls within the same line of reasoning. It is also stoutly asserted that the court erred in refusing to admit testimony concerning notice which was given to plaintiffs. This was properly rejected for the same reason, viz., that it was not material because the defendants were only liable for neglect exercised in destroying the building. All the material objections raised by the appellants to the rulings of the court fall within the same rule. The other objections raised we think are not sustained.

No error was committed by the court in the giving or refusing to give instructions, nor in the admission or rejection of testimony, and the judgment will be affirmed.

HADLEY, C. J., CROW, MOUNT, and RUDKIN, JJ., concur.

[No. 6667. Decided October 29, 1907.]

MARY M. MILLER & SONS, *Appellant*, v. T. W. DANIELS *et al.*, *Respondents*.[1]

TAXATION—DEEDS—DESCRIPTION. Tax foreclosure proceedings and a tax deed describing the property as 25 acres in a certain section are void for uncertainty in the description.

SAME—LIEN FOR TAXES PAID—DESCRIPTION OF PROPERTY. A tax receipt, showing the payment of taxes on property described as 25 acres in a certain section, is too indefinite to entitle the party paying the tax to a lien on any property in the section.

Appeal from a judgment of the superior court for Mason county, Linn, J., entered September 15, 1906, in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action of ejectment. Reversed.

L. R. Byrne and *Blaine, Tucker & Hyland*, for appellant.

Richardson & Wright, for respondents.

[1]Reported in 92 Pac. 268.

RUDKIN, J.—This was an action to recover possession of the following described real property:

"Commencing at the northwest corner of the southwest quarter of the northwest quarter of section fourteen (14) township twenty (20) north of range three (3) west; running east to a point of intersection with a creek in said section fourteen (14), thence following the course of said creek to the main channel of Swindall's Cove, thence following said cove to the place of beginning, containing about twenty-five (25) acres more or less. The said line commencing at the northwest corner of the southwest quarter of the northwest quarter of section fourteen (14) runs east about eighty (80) rods to said creek, in Mason county, state of Washington."

The defendants had judgment below, and the plaintiff appeals.

The appellant has shown a clear title to the property and a right to the recovery thereof, unless its title was devested by certain tax proceedings in the superior court of Mason county to be presently noted. On the 31st day of January, 1898, there was issued to Mason county, by the county treasurer thereof, a certificate of delinquency for certain real property in that county, in which the name of the person to whom the property was assessed was designated as Mary M. Miller, and the property described as "25 A. in Sec. 14 Twp. 20 Range 3, Acres 25, year, 1894." On the 7th day of November, 1901, this certificate was filed in the office of the clerk of the superior court of Mason county, and all subsequent proceedings in that court, including the application for tax judgment, the published notice to unknown owners, the tax judgment, the notice and return of tax sale, and the tax deed, contained the same imperfect description of the property.

It should require neither argument nor citation of authority to show that these tax proceedings are absolutely void. The only description of the property is 25 acres in section 14, which presumably contains 640 acres. If the tax deed is a bar to the present action, we perceive no reason why it should not likewise bar an action for the recovery of any other 25

acres contained in this section. There is no dissent from the rule that a description which merely designates the land conveyed as a portion of a larger tract, without greater certainty as to the identity of the particular part conveyed, is fatally defective. *Ronkendorff v. Taylor*, 4 Peters 349, 7 L. Ed. 882; *Cooper v. Lee*, 59 Ark. 460, 27 S. W. 970; *Rhodes v. Covington*, 69 Ark. 357, 63 S. W. 799; *Powers v. Sawyer*, 100 Me. 536, 62 Atl. 349; *Armstrong v. Hufty* (Ind.), 55 N. E. 443; *Shackelford v. Bailey*, 35 Ill. 387; *Brickey v. English*, 129 Ill. 646, 22 N. E. 854; *Poindexter v. Doolittle*, 54 Iowa 52, 6 N. W. 136; *Griffith v. Utley*, 76 Iowa 292, 41 N. W. 21; *Ellsworth v. Nelson*, 81 Iowa 57, 46 N. W. 740; *Cornoy v. Wetmore*, 92 Iowa 100, 60 N. W. 245; *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 528; *Peck v. Mallams*, 10 N. Y. 509; *Lafferty's Lessee v. Byers*, 5 Ohio 458; *Winkler v. Higgins*, 9 Ohio St. 599; *Humphries v. Huffman*, 33 Ohio St. 395; *Head v. James*, 13 Wis. *641.

It follows, therefore, that the tax proceedings and tax deed were utterly void and constitute no defense to this action. At the trial a tax receipt was offered in evidence tending to show that the appellant paid the taxes for the year 1894 on a certain 25 acres in section 14, but there is no more certainty in the description in this receipt than in the other tax proceedings, so that it is impossible for us to say that the taxes were paid on this particular tract; but for the reasons already stated, the judgment of the court below is reversed, with directions to enter judgment in accordance with the prayer of the complaint.

HADLEY, C. J., FULLERTON, ROOT, DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 7021. Decided October 29, 1907.]

LEWIS COUNTY, *Respondent*, v. WILLIAM McGEORGE, JR., TRUSTEE, *et al.*, *Appellants*.[1]

EMINENT DOMAIN—DRAINS—PROCEEDINGS UNDER INVALID ACT—CURATIVE STATUTE—DAMAGES. Where a drainage ditch was constructed across lands of the defendants under an act afterwards declared unconstitutional because it had not provided for compensation to the defendants, the legislature may pass a curative act providing for condemnation of a right of way for the ditch theretofore constructed; and in such proceedings the defendants are not entitled to compensation for the ditch on the theory that it was constructed on their premises by the trespassers, where the rights of the parties are adjusted as nearly as possible according to natural justice; since the legislature could protect the equitable interests of the parties constructing the ditch.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered June 28, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to appropriate and condemn a right of way for a ditch for drainage purposes. Affirmed.

C. L. Parker and *E. P. Dole*, for appellants.

Millett & Harmon, for respondent.

RUDKIN, J.—Between the 24th day of October, 1890, and the 15th day of June, 1895, the respondent, Lewis County, caused to be constructed and completed what is locally known as the Whittaker Lowry Ditch, with the exception of a certain lateral and the acquisition of the right of way, under the provisions of the act of March 19, 1890, entitled, "An act to provide for the construction, repairing and protection of drains and ditches for agricultural, sanitary and domestic purposes, and to provide for the organization of drainage dis-

[1]Reported in 92 Pac. 268.

tricts, and declaring an emergency." Laws of 1890, p. 652. The act of 1890 was thereafter declared unconstitutional by this court. *Askham v. King County*, 9 Wash. 1, 36 Pac. 1097; *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116.

The present proceeding was instituted under the act of March 19, 1895, entitled "An act providing for the payment of expenses incurred in compliance with an act entitled 'An act to provide for the construction, repairing and protection of drains and ditches for agricultural, sanitary and domestic purposes, and to provide for the organization of drainage districts, and declaring an emergency' approved March 19, 1890, and declaring an emergency," (Laws of 1895, p. 142), to appropriate and condemn a right of way for the ditch theretofore constructed under the void act of 1890, over certain lands belonging to the appellants. The parties waived a jury trial and agreed upon the damages to be awarded to the appellants, unless the appellants should be adjudged entitled to compensation for the taking of the ditch constructed under the act of 1890. The court held that the appellants were not entitled to compensation for the taking of the ditch as such, and entered judgment for the stipulated damages. The present appeal is prosecuted from that judgment, and the right of the appellants to recover compensation for the taking of the ditch constructed by the county under the provisions of the act of 1890 presents the sole question for consideration in this court.

Briefly stated, the contention of the appellants is this: The act of 1890 was void, the persons or officers who constructed the ditch under its provisions were trespassers, the ditch immediately upon its construction became the property of the owner of the land upon which the same was constructed, and cannot therefore be taken without just compensation having been first made or paid into court for the owner, under § 16 of Art. 1 of the state constitution. This argument is plausible but we deem it unsound. In *Lewis County v. Gor-*

don, 20 Wash. 80, 54 Pac. 779, it was held that the act of 1895, *supra*, was constitutional and that the legislature might give legal sanction to the moral obligation that existed in favor of those who had performed labor or expended money in the construction of drains or ditches under the act of 1890. A similar ruling has been made in numerous like cases. *State ex rel. Traders Nat. Bank v. Winter*, 15 Wash. 407, 46 Pac. 644; *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Espy Estate Co. v. Pacific County*, 40 Wash. 67, 82 Pac. 129; *State ex rel. Ames v. Lewis County*, 46 Wash. 423, 88 Pac. 760; *United States v. Realty Co.*, 163 U. S. 426, 16 Sup. Ct. 1120, 41 L. Ed. 215.

If the legislature may, under the constitution, authorize and enforce the payment of expenses incurred in the construction of drains and ditches under a void act, may it not at the same time recognize the moral and equitable claims of those who have constructed the drain or ditch and paid for such construction? The constitution protects the substance and not the shadow. As said by Judge Cooley, "A statute cannot be void as an unconstitutional interference with private property which adjusts the equities of the parties as nearly as possible according to natural justice." Constitutional Limitations (7th ed.), p. 553.

In *Bellingham Bay etc. Co. v. Strand*, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238, it was held that the appropriation of land under condemnation proceedings will not entitle the owner, in the award of damages subsequently made, to a judgment including the value of buildings erected on the land by the appropriator prior to the rendition of judgment in the condemnation proceedings. The doctrine of this case was reaffirmed in *Seattle & Montana R. Co. v. Corbett*, 22 Wash. 189, 60 Pac. 127, and *Lake Whatcom Logging Co. v. Callvert*, 33 Wash. 126, 73 Pac. 1128. In the former case the court said:

"It would be monstrously unjust to hold that it [the railway company] should be required to pay the value of the im-

provements which it had placed upon the land prior to its acquisition."

In the act under consideration the legislature recognized the moral obligation of the creditors and the equitable rights of those who constructed and paid for the ditch, it adjusted the equities of the parties "as nearly as possible according to natural justice," and in so doing, in our opinion, violated no provision of the state constitution. The judgment is therefore affirmed.

HADLEY, C. J., FULLERTON, ROOT, DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 7004. Decided October 29, 1907.]

A. J. WEST, *Respondent*, v. JOHN I. MARTIN *et al.*, *Appellants*.[1]

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS—COURTS—JURISDICTION—PLEADING—WAIVER. An objection that the court has no jurisdiction, first raised by demurrer, is not waived by failing to except to the order overruling the demurrer, where the answer expressly reserved the point and at the trial the evidence was objected to for the same reason, Bal. Code, § 4911, providing that objection to the jurisdiction can be made at any time.

SAME—APPEARANCE—EFFECT ON JURISDICTION. Objection to the jurisdiction of the subject-matter is not waived by a general appearance.

COURTS—JURISDICTION—BOND—EFFECT. Objection to the jurisdiction of the state superior court over an action to enforce a lien for damages against a vessel is not waived by the giving of a bond for the release of the vessel, conditioned to pay any judgment that might be recovered on the cause of action, where the bond is expressly stated to be a substitute for any security or claim the plaintiff might have against the vessel.

[1]Reported in 92 Pac. 334.

COURTS — JURISDICTION — ADMIRALTY. Bal. Code, § 5953, giving liens upon vessels for certain demands, including damages for injuries committed within the state, and § 5954, providing that such liens may be enforced "in all cases of maritime contracts or service" by a suit in admiralty, requires that maritime torts be enforced in admiralty, and state courts have no jurisdiction thereof.

ADMIRALTY—JURISDICTION—MARITIME TORTS—COURTS. An injury by a vessel to the pier of a bridge resting upon the bottom of a navigable stream is a maritime tort, over which the courts of admiralty have jurisdiction; especially if it is alleged that by reason of the injury, the bridge thereafter collapsed and fell into the waters and was broken up, showing that a substantial part of the injury was consummated in the water itself (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 26, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to enforce a lien against a vessel for damages. Reversed.

J. C. Cross, *W. H. Brinker*, and *Richard Saxe Jones* (*A. Emerson Cross*, of counsel), for appellants.

John C. Hogan, for respondent.

HADLEY, C. J.—This action was brought under the statutes of this state in relation to liens against steamers and other vessels. The purpose of the action is to recover damages alleged to have been sustained by the plaintiff on account of a collision between the steamer Norwood and the plaintiff's bridge. The complaint shows that the Norwood is an enrolled vessel, the owners and managing owners of which reside in the state of California, and that the plaintiff is the owner of a combination steel and wood drawbridge, together with the approaches belonging to the same, extending across the Chehalis river from Aberdeen to South Aberdeen, in Chehalis county. On the 7th day of May, 1906, the bridge was being used by the plaintiff as a toll bridge for the passage of passengers, street cars, and other traffic. It is alleged that the bridge was

authorized by the secretary of war of the United States, and that it was a lawful structure in the navigable stream. The bridge was provided with a large swinging span, which was opened by revolving the same upon a central pier constructed in the channel of the river, so that when the bridge was opened it afforded two passageways about one hundred and twenty-five feet in width on each side of the central pier, for the passage of vessels up and down the river.

It is averred that, on the day aforesaid, the defendants were operating the Norwood upon said river, and that while they were engaged in passing the vessel through the draw of said bridge, they negligently ran her against the supporting piers of one of the spans of the bridge, and thereby injured the piers to such an extent that within a few hours thereafter one of the spans fell into the waters of the river and was broken up and almost utterly destroyed. By virtue of the statutes aforesaid, the complaint alleges that plaintiff is entitled to a lien upon the vessel for the damages sustained, and after alleging nonresidence of all the defendants and that the vessel was about to be taken from the state of Washington to some port in the state of California, it was asked that a receiver should be appointed to take charge of the vessel pending the action. The court appointed a temporary receiver to take immediate charge of the vessel, and issued an order that the defendants should show cause why a permanent receiver should not be appointed. Before the time fixed for hearing upon the order to show cause, the defendants applied to the court for discharge of the vessel from the receivership upon their signing a bond to plaintiff in the penal sum of $30,000, conditioned that they would pay any judgment or claim which the plaintiff might establish in said cause of action. Such bond was given, it being expressly stated therein that one of its conditions is that the personal liability of the principals and surety shall be substituted for any security which the plaintiff may have against the vessel. Thereupon the vessel was discharged from the receivership and turned over to the defendants.

The defendants thereafter demurred to the complaint, on the ground that the court has no jurisdiction of the subject-matter of the action, and also that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendant Hulbert was dismissed from the action, and the remaining defendants answered jointly, expressly stating that they did so without waiving their demurrer, and still insisting upon their rights as claimed under the demurrer. The answer admits that the Norwood is an enrolled vessel of about seven hundred and fifty tons gross burden, or about five hundred tons net burden; that the defendants Sudden & Christenson, of San Francisco, California, are the managing owners thereof, and that the defendant Martin is the master of the vessel, but denies any negligence or liability in the premises. The affirmative allegations of the answer are very extensive and need not be enumerated at this time. It was stipulated that the cause should be tried by the court without a jury, and after such trial the court made its findings of facts and conclusions of law and entered judgment that the plaintiff shall recover from the defendants the sum of $13,751.89, and costs. This appeal is from said judgment.

It is assigned that the court erred in holding that it had jurisdiction. The respondent contends that, for several reasons, appellants have waived this point; (1) for the reason that no exception was taken to the ruling upon the demurrer to the complaint. It is true the record does not show a formal exception entered at the time the order overruling the demurrer was made, but it does show that the demurrer was argued by counsel, and that the court was fully advised, and later, when the answer was presented, it expressly stated in its commencing clause that the appellants answered "without waiving their demurrer herein and still insisting upon their rights as claimed under such demurrer." Furthermore, at the trial, the appellants objected to the introduction of any testimony in support of the complaint, for the reasons stated in the demurrer. This objection was overruled. It is therefore manifest from the

record that appellants did not waive their objections to the jurisdiction as raised by the demurrer, and that the court was fully advised thereof before the trial began. Moreover, under our statute, Bal. Code, § 4911 (P. C. § 378), the objection that the court has no jurisdiction may be raised "at any stage of the proceedings either in the superior or supreme court." (2) For the reason that appellants entered their general appearance in the action. The record discloses a notice of general appearance, filed at a time prior to the filing of the demurrer or answer. If the question here involved were that of jurisdiction of the persons of the appellants, this point would be against them; but if, as they contend, the court had no jurisdiction of the subject-matter of the action, then no appearance they could make could confer jurisdiction. 11 Cyc. 673, 674, and cases cited. (3) For the reason that appellants gave a bond for the release of the Norwood from the hands of the receiver, and that the action then proceeded as an ordinary action at law for damages. It is true the bond stated that the obligors would pay any judgment that should be established upon respondent's cause of action mentioned in his complaint. But it was expressly stated that the personal liability was substituted "for any security or claim which the said plaintiff A. J. West may have against or in the said vessel Steamer Norwood, her tackle, apparel, furniture, engines, boilers, etc." It is therefore evident that if the court had not jurisdiction of the subject-matter of the cause of action stated in the complaint, viz., the enforcement of a lien against the vessel, it could not by virtue of the recitals in the bond enter judgment against the bondsmen whose liability was substituted for that of the vessel on condition that it should be found in said cause that the vessel itself was liable.

The objection of respondent to the consideration of the question of jurisdiction must therefore be denied, and we proceed now to the examination of that subject. It must be said that the determination of the subject is not unattended with difficulty, involving as it does an examination of the Federal

decisions, somewhat difficult to reconcile and apply to the facts of this case. The action was brought in the state court to enforce a lien alleged to exist by virtue of a state statute, Bal. Code, § 5953, the pertinent part of which is as follows:

"All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable,— . . .

"6. For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state.

"Demands for these several causes constitute liens upon all steamers, vessels and boats, and their tackle, apparel, and furniture, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of three years from the time the cause of action accrued."

The next section of the statute, Bal. Code, § 5954 (P. C. § 6081), deals with the procedure for the enforcement of the liens. The section is as follows:

"Such liens may be enforced, in all cases of maritime contracts or service, by a suit in admiralty, in rem, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime, by a civil action in any district court of this territory."

It will thus be seen that, if the cause of action here is based upon a maritime tort, then even the state statute requires that it shall be enforced in admiralty. We must therefore determine whether this is a maritime tort or a tort not maritime in its nature. The injured property was a bridge which was suspended over navigable waters and supported by piers planted in the soil beneath such waters. The injury was caused by a moving vessel in said waters. There seems to be no doubt under the decisions that, if the injury had been to the vessel and caused by the bridge, it would have constituted a maritime tort, for the reason that the thing so injured would have been clearly maritime in its character and location. The controversy here is whether the injury to the bridge occurred upon navigable waters and so as to make the tort causing it a

maritime one, or whether the bridge's connection with the soil and shore rendered it such a land structure as made the injury nonmaritime. The case of *Milwaukee v. The Curtis*, 37 Fed. 705, decided in the year 1889 by the district court of the United States for the eastern district of Wisconsin, involved facts similar to those of this case. A lawfully constructed bridge spanned the navigable waters of the Milwaukee river. It was a swinging bridge, its center resting upon a stone pier constructed upon the bed of the river. The bridge was damaged by a vessel moving in the river. A libel *in rem* was brought in the Federal court to recover damages. The objection was made that the court was without jurisdiction of the subject-matter, and this contention was sustained and the libel dismissed. It was said in that case:

"In cases of tort locality is the test of jurisdiction in the admiralty. The ultimate judicial authority has determined the principle that the true meaning of the rule of locality is that, although the origin of the wrong is on the water, yet, if the consummation and substance of the injury are on the land, a court of admiralty has not jurisdiction; that the place or locality of the injury is the place or locality of the thing injured, and not of the agent causing the injury."

The court held that the bridge was not upon the water because suspended in space above water, but that it was a mere prolongation over the water of a highway upon land. The primary authority upon which the decision was based appears to have been *The Plymouth*, 3 Wall. 20, 18 L. Ed. 125. In that case a vessel which was lying at a wharf on waters subject to admiralty jurisdiction took fire and the fire spread to certain storehouses on the wharf, consuming the buildings and their contents. It was held not to be a case for admiralty jurisdiction. The court said:

"It will be observed, that the entire damage complained of by the libellants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the sub-

stance and consummation of the injury on land. It is admitted by all the authorities, that the jurisdiction of the admiralty over maritime torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark."

It will be observed that, in *The Plymouth, supra*, the structures injured were not in or over the waters of the navigable channel, and they were held to be upon the land. In application of the reasoning of the supreme court of the United States in said cause, the Federal trial court, in *Milwaukee v. The Curtis, supra*, seems to have been led to hold that a bridge should be classified with the warehouses on the wharf, as being upon land. In that case the court also cited in support of its decision *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 6 Sup. Ct. 25, 30 L. Ed. 274, where it was held that admiralty has no jurisdiction to try the question of damage to buildings on land caused by fire communicated from the smokestack of a vessel. Again, in *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447, the jib boom of a vessel towed by a steam tug in the Chicago river struck a building on land, causing damage to it and the loss of shelled corn stored in it. It was held not to have been a maritime tort of which admiralty had jurisdiction. So far it will be seen that the cases decided by the Federal supreme court have involved injuries to structures wholly upon land or upon a wharf, and have not included bridges over navigable waters. The Federal trial courts have differed in their interpretation of the doctrine of *The Plymouth*, so far as it should be applied to bridges. In the case of *The Arkansas*, 17 Fed. 383, the court reasoned as follows:

"But suppose, on the other hand, the structure, whether bridge, boom, pier, or light-house, be a lawful one; suppose it to be placed in the navigable bed of the river by lawful authority; and suppose some reckless mariner should carelessly run his vessel upon it and injure it; can it be doubted

that the *tort* thus committed would be within the admiralty jurisdiction? Can it be doubted that in such case the owner of the structure might proceed against the owners of the boat *in personam*, or against the boat itself *in rem*? The *tort* itself would be a marine *tort;* it would be, as to place, within the admiralty jurisdiction. The owner of the structure would have a right to proceed *in rem* against the boat, because, from its nature, a maritime lien could attach to the boat."

Again, in the case of *The F. & P. M. No. 2*, 33 Fed. 511, the court approvingly refers to *The Arkansas*, *supra*, as having declared the law to be,

"that where a structure lawfully created in the navigable channel of a river is injured by a collision caused by the negligent management of a vessel, the owner of such structure may proceed in an admiralty court, by action *in personam* against the owners of the vessel, or *in rem* against the vessel. If this be the law,—and I have no doubt it is,—no reason is perceived why the owner of a raft of logs which is in course of transit on navigable waters, may not proceed *in rem* against a boat or vessel which negligently runs into and destroys or injures the raft."

This is clearly a case where it is our duty to follow the doctrine of Federal decisions, and so far as the above-cited decisions are concerned, we are without any decision from the final Federal authority directly involving such a structure as a bridge over navigable waters under similar facts, and we also find the subordinate Federal courts differing as to the application that shall be made of certain decisions to bridges and similar structures.

The appellants urge that a later decision of the supreme court has modified and practically overruled *The Plymouth* and the other decisions. They cite *The Blackheath*, 195 U. S. 61, 25 Sup. Ct. 46, decided in the year 1904. In that case it was held that admiralty has jurisdiction of a libel *in rem* against a vessel for damages caused by its negligently running into a beacon in a channel, although the beacon is attached to the bottom. So far as we are advised, the above-

cited case is the first one in which the Federal supreme court considered the injury caused by a vessel to a thing attached to the soil and within the channel of a navigable highway. The opinion was written by Mr. Justice Holmes, and it reviews the decisions which seem to bear in any way upon the subject-matter, including the pioneer case of *The Plymouth*, which was decided in 1865. More or less weight seems to have been accorded to all of the decisions in consideration of the particular facts in each case, and no case was expressly declared to be overruled. Some expressions in the opinion seem to us to be significant. Citing with approval *The Arkansas, supra*, the court said:

"But, as has been suggested, there seems to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was. . . . And again it seems more arbitrary than rational to treat attachment to the soil as a peremptory bar outweighing the considerations that the injured thing was an instrument of navigation and no part of the shore, but surrounded on every side by water, a mere point projecting from the sea."

Referring to the facts in the case of *The Plymouth*, the opinion says:

"Moreover, the damage was done wholly upon the mainland. It never has been decided that every fixture in the midst of the sea was governed by the same rule. The contrary has been supposed in some American cases,"

citing *The Arkansas* and *The F. & M. P. No. 2, supra;* also stating that the same "is indicated by the English books cited above." Having thus clearly distinguished *The Plymouth* from the case then before the court, involving as the latter did a structure attached to land in the midst of the sea, the court further said:

"It is unnecessary to determine the relative weight of the different elements of distinction between *The Plymouth* and the case at bar. It is enough to say that we now are dealing with an injury to a government aid to navigation from an-

cient times subject to the admiralty, a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea. In such a case jurisdiction may be taken without transcending the limits of the Constitution or encountering *The Plymouth* or any other authority binding on this court."

Thus, without discussing the recognized "different elements of distinction" between the two cases, the court confines its discussion to *one* element, viz., that the beacon was a government aid to navigation and subject to admiralty. We believe, however, that views expressed in the opinion—such, for instance, as that it is more arbitrary than rational to treat attachment to the soil, which is only technically land through a connection at the bottom of the sea, as a peremptory bar outweighing other considerations—indicates that, if the injured thing had not been an aid to navigation, but was a mere lawful structure at that place, the injury to it would have been held to have been a maritime one and subject to admiralty. Our interpretation of the opinion in this regard is emphasized by the concurring opinion of Mr. Justice Brown in the same case. We here set forth the concurring opinion:

"I do not dissent from the conclusion of the court, although for forty years the broad language of Mr. Justice Nelson in the case of *The Plymouth*, 3 Wall. 20, has been accepted by the profession and the admiralty courts as establishing the principle that the jurisdiction of the admiralty does not extend to injuries received by any structure affixed to the land, though such injuries were caused by a ship or other floating body. It received the approval of this court in the case of the *Phoenix Insurance Company*, 118 U. S. 610, and in that of the *Chicago & Pacific Elevator Company*, 119 U. S. 388, and has been followed by the courts of at least a dozen different districts, and applied to bridges, piers, derricks and every other class of structure permanently affixed to the soil.

"I do not think this case can be distinguished from the prior ones, as, in my opinion, it makes no difference in principle whether a beacon be affixed to piles driven into the bot-

tom of the river or to a stone projecting from the bottom, or whether it be surrounded by twelve feet or one foot of water, or whether the injury be done to a wharf projecting into a navigable water, or to a beacon standing there, or whether the damage be caused by a negligent fire or by bad steering.

"I accept this case as practically overruling the former ones, and as recognizing the principle adopted by the English Admiralty Court Jurisdiction Act of 1861 (sec. 7), extending the jurisdiction of the admiralty court to 'any claim for damages by any ship.' This has been held in many cases to include damage done to a structure affixed to the land. The distinction between damage done to fixed and to floating structures is a somewhat artificial one, and, in my view, founded upon no sound principle; and the fact that Congress, under the Constitution, cannot extend our admiralty jurisdiction, affords an argument for a broad interpretation commensurate with the needs of modern commerce. To attempt to draw the line of jurisdiction between different kinds of fixed structures, as, for instance, between beacons and wharves, would lead to great confusion and much further litigation."

The above is an interpretation of the necessary force and scope of the main opinion by a member of the tribunal that rendered the decision and who concurred therein. It is true the main opinion distinguishes the former cases, while the concurring opinion does not; but for reasons heretofore stated we believe the distinguishment of the former cases does not lead to a distinguishment of the facts in the case before us from the facts and argument in the decision in *The Blackheath*. Since the rendering of that decision and in the year 1906, the district court of the United States for the southern district of New York, in the case of *Bowers Hydraulic Dredging Co. v. Federal Contracting Co.*, 148 Fed. 290, expressed the view that, by the decision in *The Blackheath*, "the admiralty jurisdiction has been broadened very considerably," and that some of the artificial distinctions that have been heretofore observed as ousting the jurisdiction of admiralty cannot be observed in the future. In that case a dredge whose work was performed partly on land and partly on water was held to be within the admiralty jurisdiction, and the court on

the strength of *The Blackheath* refused to follow the former decisions that would have led to a different result.

The above Federal judicial interpretations of the scope of the decision in *The Blackheath*, we believe we should follow. Especially do we believe we should do so until the final Federal authority may have more definitely stated a contrary view. We therefore believe the facts of this case bring the subject-matter within the admiralty jurisdiction. The point of the immediate contact which precipitated the injury was a pier which it is alleged lawfully stood within the channel of navigable waters. It rested upon soil to be sure, but soil which formed the bottom of the sea and was therefore not land technically speaking. It was as much in the sea as was the beacon in *The Blackheath*. Its locality with reference to the sea was the same as the beacon, and the mere fact that it was applied to another use we believe cannot be material. Even in *The Plymouth* it will be remembered the court said that jurisdiction over maritime *torts* depends upon locality, and that, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high water mark. We do not believe it will ever ultimately be held that, for the purposes of jurisdiction, a distinction must be made between a pier which stands in navigable waters and a beacon which stands in the same locality, merely because the pier supports a bridge which spans across the waters to the shore. The pier as the supporting agency, the foundation of the structure, it would seem must draw the structure to its own locality, that of the waters.

In any event, even if it shall be held that we are in error in the foregoing interpretation of the scope of Federal decisions, still there is another element in this case which we think, within the technical distinctions which have been made in the decisions, must bring the case within admiralty jurisdiction. The complaint alleges that the appellants;

"Negligently, carelessly and through failure to exercise ordinary skill in the handling, management and navigation of

said vessel, ran said vessel against the supporting piers of one of the spans of plaintiff's said bridge and thereby, through the carelessness and negligence of the defendants' struck, broke and injured the piers supporting the plaintiff's bridge to such an extent that within a few hours thereafter one of the spans of the plaintiff's said bridge collapsed and fell into the waters of the said Chehalis river and was broken up and almost utterly destroyed."

It is manifest from the foregoing that at least a substantial part of the resulting injury was consummated on the very surface of and in the water itself. If the other facts discussed were not sufficient of themselves to establish a maritime locality for the resulting injury, certainly this additional circumstance must complete the chain of facts necessary to do so. If it be said that the argument upon this point is technical, it must be said in reply that very technical distinctions appear to have necessarily formed a part of the history of the law upon this subject.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

DUNBAR, RUDKIN, CROW, MOUNT, and ROOT, JJ., concur.

FULLERTON, J. (dissenting)—I dissent. I think the case falls within the rule of the case of *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447, and that the tort committed is within the jurisdiction of the state courts.

[No. 6854. Decided November 1, 1907.]

DAVID M. HOFFMAN *et al.*, *Appellants*, v. GEORGE L. DICKSON *et al.*, *Respondents*.[1]

PARTY WALLS—AGREEMENTS—VENDOR AND PURCHASER—TITLE—DEFECTS—SPECIFIC PERMORMANCE—DECREE. A party wall agreement, expressly made to run with the land and binding upon the parties and their assigns, containing a covenant to pay one-half the cost of the wall when the wall shall be used, passes the right to compensation to the grantee of the building at the time of such use, and cannot be enforced or discharged until such time; hence an agreement to convey, by warranty deed, lots encumbered by such agreements, is performed by deed of general warranty, and specific performance thereof may be decreed; but the decree cannot require the vendor to discharge the lien or deposit one-half such cost to await the time of payment.

Cross-appeals from a judgment of the superior court for Pierce county, Irwin, J., entered February 14, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

Campbell & Powell, for appellants.

Harry H. Johnston and *John A. Shackleford*, for respondents.

HADLEY, C. J.—This is an action for the specific performance of a contract to sell real estate. The written evidence of the contract is as follows:

"Tacoma, Wash., Feb. 28, 1906.

"Received of A. J. Weisbach, trustee, five hundred dollars earnest money on purchase of lots 21 and 22, block 1104, Tacoma, purchase price $75,000. $39,500 cash on delivery of warranty deed, $35,000 on or before five years. Interest 6 per cent, payable annually, secured by first mortgage on

[1]Reported in 92 Pac. 272; 93 Pac. 523.

this property. Purchaser to have five days to examine abstract to be furnished by me.

Geo. L. Dickson.
"Minnie Dickson."

The person named in the receipt as trustee acted for, and in behalf of, the plaintiffs in this action, and paid to the defendants the $500 earnest money. Plaintiffs subsequently discovered the existence of two party-wall agreements affecting the lots mentioned, one agreement affecting lot 21 and the other lot 22. Lot 21 is joined by lot 20, and on the 20th day of May, 1890, William R. Hawks and the Tacoma Land Company were the respective owners thereof. On that day said owners entered into a party-wall agreement providing that Hawks, as the owner of lot 20, might erect a four-story brick building on his lot, and place the wall thereof one-half on each of said lots; that Hawks should furnish the materials, construct the wall, and keep a true account of the cost thereof; that before the said adjoining owner of lot 21, its successors or assigns, shall use the wall, it or they shall first pay one-half the cost thereof. It was also provided that the benefits and burdens of the covenants contained in the agreement shall annex to and run with the land, so long as the wall continues to exist, and shall bind the heirs, legal representatives, and assigns of the respective parties. The wall was built. The ownership of both lots had since changed, but the wall has neither been used nor has payment been made therefor by the owner of lot 21. Said lot 22 is adjoined by lot 23, and on the 28th day of February, 1889, Samuel Isaacs, with his co-owners and the Tacoma Land Company, were the respective owners of said lots. On that day said owners entered into a party-wall agreement by the terms of which Isaacs and his co-owners might erect a three-story brick building on their lot, and place the wall thereof one-half on each lot. The other material terms of the agreement are substantially the same as those of the other agreement above mentioned, and in addition to what was recited in the other, it was expressly stated in this that

a lien shall exist against lot 22 for one-half the cost of the wall. This wall was also built, and the owner of lot 22 has neither used the wall nor paid therefor. By mesne conveyances the defendants are now the owners of lots 21 and 22, which they agreed to sell to the plaintiffs as above stated.

On the discovery of the party-wall agreements, the plaintiffs, as the purchasers of said lots under said contract, demanded that the lots should be conveyed to them free from the incumbrance existing by reason of the agreements. The demand was refused, and this suit was then brought. The cause was tried by the court without a jury, and the court found that incumbrances exist for the amounts of one-half the cost of the walls respectively, but held that the incumbrances are such that they cannot now be removed by the defendants, but that the plaintiffs are entitled to a deed of general warranty as against all incumbrances, including these. Both parties have appealed, the defendants claiming that plaintiffs are entitled to no relief except the return of the $500 paid by them; and the plaintiffs contending that they are entitled to a decree requiring a conveyance with the liens removed, or that upon payment of the stipulated purchase price less the amount of one-half the cost of the walls, a conveyance shall be made.

The court found that the evidence was insufficient and too indefinite to support a finding of the cost of the party walls, so that one-half thereof might have been deducted from the amount of the purchase price, even if the authority to require the deduction existed. In view of the determination we have decided must be made in the case, we find it unnecessary to discuss the evidence or to review the action of the court with reference to the cost of the walls.

The appellants, plaintiffs, in their brief say they are unable to understand what the trial court meant when it said that liens exist by reason of the party-wall agreement, but that the respondents, defendants, cannot now remove them. The writer of this opinion confesses that he was at first sur-

prised at this somewhat anomalous statement of the court. As a matter of first impression it appeared to be a simple thing to ascertain the cost of the walls, to pay one-half thereof to the respective wall-owners, and to procure releases of the liens. An examination of the authorities submitted, however, convinces us that the statement of the learned trial court presents a real paradox. Appellants view the court's statement as embodying an absurdity, but in the light of many authorities it becomes a true statement. There is undoubtedly much conflict in the authorities upon the subject of party-wall agreements. Possibly the conflict is often more apparent than real, arising out of the manifold differences in the contract provisions and the consequent attempt of the courts to give proper effect to all the provisions.

It is the contention of respondents that the payment by them to the then owners of the adjoining lots, of one-half the cost of the walls, would not have removed the liens. It will be remembered that the contracts both provide that the benefits and burdens of the covenants contained in them shall annex to and run with the land so long as the respective walls continue to exist, and shall bind the heirs, legal representatives, and assigns of the respective parties. Respondents urge that, under the authorities, when such contracts are made so as to require the benefits and burdens created thereby to annex to and run with the land, the right to receive payment for the one-half of the cost of the party wall belongs only to the owner of the wall at the time it is used by the adjoining owner, at which time only can payment be made. If that theory of the law applicable to these contracts is correct, then the holding of the trial court is correct. These walls have not been used by the adjoining owner. If these appellants become the adjoining owners, it is not known when they or their grantees will use the walls, if ever. It cannot now be known whether the present owners of the walls will be the owners when the walls shall be used. If they shall not, and if the lien can be satis-

fied by payment only to those who shall then own the walls, it is manifest that the respondents cannot now remove the liens.

Our attention is called by respondents to a well-considered opinion of the supreme court of Kansas, *Southworth v. Pering*, 71 Kan. 755, 81 Pac. 481, and also to the opinion on rehearing in the same case, reported in 71 Kan. 761, 82 Pac. 785. After reviewing a number of authorities, it was held that when the covenants of a party-wall agreement are clearly made binding on the heirs and assigns of the respective parties, they create benefits and burdens which run with the land, and where there is a covenant by one party to pay one-half the cost of a wall erected by the other, then if conveyances of each lot are made after the building is erected, the subsequent owner of the vacant lot who makes use of the party wall must make payment to the then owner of the lot upon which the first building was erected. The court concluded its arguments as follows:

"Without attempting to declare what general principles relating to the question presented are sustained by the greater number of decisions, we shall decide it upon these considerations: We regard contracts of the character of that here involved as in their nature so related to the real property affected, and so adapted to impose their obligations and bestow their benefits upon the successors in title of the landowners by whom they are made, that the purpose that they shall have that effect is readily to be inferred from the employment of language having any substantial tendency in that direction. In the present case we hold that the use of the clause making the terms of the contract binding upon the heirs, executors, administrators, and assigns of the parties sufficiently indicates that intention. What the effect of the omission of that provision might have been we do not now determine."

Again, in the opinion on rehearing, the court further said:

"It must be conceded also that none of the cases, in which the right to receive compensation from one using a party wall already built is held to pass to the grantee of the builder, arose upon a contract precisely like the one here involved.

Nevertheless the fact remains that the weight of authority supports the view that party wall contracts may be so drawn as to have their effect, and that in each case the question is whether such is the intention of the parties, as shown by the language used. Moreover, there is abundant authority for the proposition that this intention may be inferred from a provision that the money shall be paid to the first builder or his assigns."

It will thus be seen that the Kansas court declared the weight of authority to be in favor of the rule which it followed, when party-wall agreements contain such provisions as are found in those now before us, requiring that the covenants shall run with the land and be binding upon the heirs and assigns of the parties. The same was held by the supreme court of Nebraska in *Loyal Mystic Legion v. Jones*, 73 Neb. 342, 102 N. W. 621, where a former decision of the same court, *Cook v. Paul*, 4 Neb. (Unof.) 93, 93 N. W. 430, was criticized as being "unofficial." There is undoubtedly much conflict of authority upon party-wall subjects. Indeed, such agreements seem to have been a prolific source for a variety of judicial views. But the views of the Kansas and Nebraska courts, as applied to such provisions as are above discussed, are sustained by the following further authorities: *Adams v. Noble*, 120 Mich. 545, 79 N. W. 810; *King v. Wight*, 155 Mass. 144, 29 N. E. 644; *Platt v. Eggleston*, 20 Ohio St. 414; *National Life Ins. Co. v. Lee*, 75 Minn. 157, 77 N. W. 794; *Mott v. Oppenheimer*, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409; *Keating v. Korfhage*, 88 Mo. 524; *Thomson v. Curtis*, 28 Iowa 229. See, also, 22 Am. & Eng. Ency. Law (2d ed.), 256, and note 9:

Thomson v. Curtis, supra, is based upon a statute in Iowa, but the statute merely emphasizes the principle held by the above authorities, that when heirs, grantees, and assigns are in express terms of the contract mutually bound, the intention is clear that the covenants shall run with the land and shall be

given effect accordingly. In commenting upon the authorities, the opinion in *Adams v. Noble, supra*, says:

"It is difficult to harmonize all the authorities, but we think they may fairly be divided into two classes,—one class holding that the covenant for payment is personal, and does not run with the land, when it is apparent from the contract that the payment should be made to the party building the wall, and there are no words indicating that the right to receive payment shall pass to his assigns; the second class holding that the covenant runs with the land, and passes to the purchaser or assignee, when the contract evinces such intention, and where the language used is between the parties and their assigns, and the contract declares the covenant shall be perpetual, and binding upon the parties and their heirs and assigns."

The contracts involved in the case at bar belong to the second class as the classification is made in the above quotation, and, in view of the above authorities, we therefore find that the holding of the trial court that the incumbrance cannot now be removed by respondents is true, because neither the time for payment nor the person authorized to receive payment and discharge the lien can now be ascertained.

Appellants insist that the cost of the walls should have been ascertained by the court and the respondents required to deposit one-half the amount thereof in the registry of the court to await the time for payment. Such a course would have been inequitable and impracticable. Respondents would have been required to deposit their money and appellants or their grantees might not for twenty years, and possibly never, have used the wall. The money would thus have been idle for an indefinite time. Moreover, the persons who shall ultimately be entitled to receive the payment will be entitled to be heard as to the amount when the same shall be determined. He was not present before the court, and even his identity could not then be known. In so far as there exists an incumbrance against the property, respondents under the contract might now be required to discharge it, if they could do so. But that being impossible, the decree requires them to deliver their deed

with covenants of general warranty. That is exactly what their contract in express words requires, as follows: "Purchase price $75,000. $39,500 cash on delivery of warranty deed," etc. The covenants of warranty will continue against any real incumbrance. The decree provides that the rents which have meanwhile accrued from the purchased property shall go to appellants, and that respondents shall have six per cent per annum interest for the same time upon the delayed cash payment, together with an antedated note and mortgage for the deferred payment on the terms as originally agreed. We think the decree calls for substantial performance of the contract, and that from the record before us it does justice between the parties. What has been said makes it unnecessary to discuss the cross-appeal.

The judgment is affirmed.

RUDKIN, ROOT, DUNBAR, CROW, and MOUNT, JJ., concur.

ON REHEARING.

[Decided January 22, 1908.]

PER CURIAM.—Since the opinion was filed in this cause, and pending a petition for rehearing, we have discovered certain words used by the trial court in its decree which were not observed by us before the opinion was filed. The decree recites that appellants are entitled to a deed of general warranty "subject to the liens for one-half of the cost of constructing both of said party walls." In affirming the judgment the possible legal effect of the quoted words was overlooked by us since the matter had not been called to our attention.

We stated in our opinion that appellants are entitled to a deed with covenants of general warranty, that being what was specified in the contract. Such should unmistakably be the provision of the decree. The quoted words must have been used in the decree by a mere inadvertence, inasmuch as the record shows that the trial court found one-half the cost of the party walls to be incumbrances. The contract does not

call for a warranty deed subject to any incumbrances. The reason the trial court did not require the present removal of the liens was because, for reasons stated in the main opinion, they are not now removable. The persons who may be entitled to the payment when the walls shall be used, if they are ever used, cannot now be ascertained. Respondents must, therefore, comply with their contract and deliver a general warranty deed; but they cannot comply with the contract by delivering a warranty deed which is expressly made subject to the incumbrances. We do not believe that the trial court intended the legal effect which the words used may import, and we have not understood that respondents so contend. But that no controversy may arise as to the true meaning of the decree, it should be modified by striking out the words above quoted. In all other respects the judgment is affirmed, the petition for rehearing is denied, and the cause is remanded for the purpose of said modification.

[No. 6855. Decided November 1, 1907.]

H. M. BRUMMETT, *Respondent*, v. M. J. GLEASON *and* MONTESANO NATIONAL BANK, *Appellants*.[1]

APPEAL—REVIEW—PLEADING—AMENDMENTS. Upon objection that a complaint does not state sufficient facts, the supreme court will consider it amended to conform to the proofs, where no demurrer was interposed.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered January 28, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to declare a trust in real property. Affirmed.

[1]Reported in 92 Pac. 266.

B. G. Cheney, for appellants.

W. H. Abel, for respondent.

RUDKIN, J.—This action was brought to declare a trust in real property. The complaint alleged that the plaintiff conveyed the property to the defendant Gleason, without consideration, and in trust for the sole use and benefit of of the plaintiff, with the understanding that the plaintiff should remain in possession thereof; that the plaintiff did remain in actual, open, notorious and exclusive possession of the property; that the defendant Gleason agreed to reconvey the property to the plaintiff on demand; that he has failed and refused so to do, and other allegations not deemed material here. The answer admitted the conveyance to the defendant Gleason, but averred that the conveyance was for a valuable consideration and was absolute in fact as well as in form. The court below found that the conveyance was intended as a mortgage to secure certain advances to be made by the defendant Gleason, and money borrowed and to be borrowed by the defendant Gleason for the use of the plaintiff, and entered a decree adjusting the equity of the parties upon the mortgage theory. From that decree the present appeal is prosecuted.

It is first contended by the appellant that the complaint did not state facts sufficient to constitute a cause of action. However this may be, no demurrer was interposed to the complaint, and it is our duty at this time to consider the complaint amended, if need be, to conform to the facts proved on the trial. *Richardson v. Moore*, 30 Wash. 406, 71 Pac. 18; *Irby v. Phillips*, 40 Wash. 618, 82 Pac. 931. It appears clearly and satisfactorily from the testimony that the conveyance was intended as a mortgage, as found by the court, and that the appellant has grossly abused the trust confided in him. The findings as to the purpose of the conveyance and in the matter of the accounting between the parties is amply sustained by the testimony, the

legal conclusions follow from the findings as a matter of course, and the judgment is accordingly affirmed.

HADLEY, C. J., FULLERTON, CROW, MOUNT, ROOT, and DUNBAR, JJ., concur.

[No. 6937. Decided November 1, 1907.]

ARBUTA B. DONOVAN, *Appellant*, v. C. CLAIR OLSEN, *Respondent*.[1]

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—EVIDENCE—SUFFICIENCY. Testimony of a wife that property acquired in her name soon after her marriage was paid for in part by $500 received by her by gift, and in part by money saved from her personal earnings, is not sufficient to show that community property entered into the purchase, but it will be inferred that the personal earnings were acquired before marriage, where she was permitted by counsel to state positively the ultimate facts that no part of it was community property and that the husband had no interest therein, and none of it was acquired by their joint efforts, and that he had no property and earned no wages up to that time; and the fact of his doing some work on the property is immaterial.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered April 2, 1907, dismissing an action to quiet title, and awarding an undivided one-half interest in real property to the defendant, after a trial before the court without a jury. Reversed.

Danson & Williams, for appellant.

John L. Wiley, for respondent.

RUDKIN, J.— This was an action to quiet title. The plaintiff and Clarence C. Olsen intermarried on December 27, 1908, and the defendant, C. Clair Olsen, is the sole issue of that marriage. The property in controversy was acquired in the name of the plaintiff, in May, 1899, and

[1]Reported in 92 Pac. 276.

Clarence C. Olsen died intestate on November 1, 1902. The character of the property, whether separate property of the plaintiff, or community property of the plaintiff and her deceased husband, is the only question in the case. The court below found that the purchase price of the property was paid in part from separate funds of the plaintiff, and in part from community funds of the plaintiff and her deceased husband; that such funds were so commingled as to be impossible of identification, and entered judgment dismissing the action and awarding an undivided one-half interest in the property to the defendant. From this judgment the present appeal is prosecuted.

The deposition of the appellant, taken in the State of Montana, was the only testimony offered at the trial, and we think it utterly fails to support the judgment of the court. The only portions of the deposition bearing upon the question at issue are the following:

Direct Examination: "12. What interest, if any, did your former husband, Clarence C. Olsen, have in said real estate at any time? Ans. No interest whatever. 13. Where did the money come from with which said lots were purchased? Ans. $500.00 was received as a gift from my great aunt, which money came with a letter which is attached hereto and marked Exhibit 'A,' and money saved from my own earnings. 14. How did you obtain such money with which said lots were purchased? Ans. Part of it earned and part given to me. Clarence C. Olsen had but $20.00 when we married, and until August, 1899, he earned no wages. I paid all expenses for everything used by us during that time. During the next year he only worked two-thirds of the time at from $1.50 to $2.00 a day while working. 15. Did your husband, Clarence C. Olsen, have any interest in any of the money used in purchasing said lots? Ans. No, sir. 16. Was any of the money for the purchase of said lots acquired by the joint efforts of yourself and former husband, Clarence C. Olsen? Ans. No, sir."

Cross-examination: "1. State whether or not at the time you purchased said lots your then husband, Clarence C.

Olsen, paid any portion of the purchase price thereof out of his own property or of the community consisting of yourself and the said Clarence C. Olsen? Ans. No, sir. 2. If you answer that he did, state how much money he so paid and how much you paid for the lots? Ans. I paid $125.00 for the lots. 3. If you state that he did pay a portion of the purchase price for said lots, state whether or not you were to repay him therefor out of your own separate property, and if so, did you so pay him? Ans. He did not pay anything."

Whether the husband had any interest in the funds which entered into the purchase price of the property, and whether the property acquired became separate or community, presents mixed questions of law and fact, but counsel on both sides assumed by their questions that the witness was familiar with the law and permitted and required her to testify to the ultimate fact in issue—namely, the character of the property. The only portion of the testimony which tends in the remotest way to support the judgment is the statement that the property was paid for in part with money saved from the personal earnings of the appellant; but when this statement is considered in connection with the remainder of the testimony and in the light of the fact that the property was acquired soon after marriage, the only proper or reasonable inference is that the earnings referred to were the personal earnings of the wife prior to her marriage. We think it clearly appears, therefore, that the property was paid for by the appellant out of her separate funds, and that the respondent has no interest therein. If we assume that the deceased husband performed some labor in fencing and making improvements on the land this would not change its character.

The judgment of the court below is reversed, with directions to enter judgment in accordance with the prayer of the complaint.

HADLEY, C. J., FULLERTON, CROW, MOUNT, ROOT, and DUNBAR, JJ., concur.

[No. 7007. Decided November 1, 1907.]

OLGA RAMSDELL, *Respondent*, v. EDWIN AUGUSTUS RAMSDELL, *Appellant*.[1]

APPEAL—REVIEW—QUESTIONS REVIEWABLE. The appellant has a right to appeal on the judgment roll and question the sufficiency of the complaint and findings to support the judgment.

DIVORCE—PLEADING—JURISDICTION—RESIDENCE. An allegation of plaintiff's residence in this state for one year, and in the county at the time suit is brought, is essential to jurisdiction in an action for divorce.

APPEAL—RECORD—BILL OF EXCEPTIONS. Testimony not embodied in a bill of exceptions or statement of facts cannot be considered on appeal.

APPEAL—REVIEW—AMENDMENTS—DIVORCE—JURISDICTION. Where the complaint and findings in an action for a divorce fail to show the residence of the plaintiff, and the evidence is not brought up on appeal, the complaint cannot be deemed amended to cure the defect, and a decree of divorce must be reversed for want of jurisdiction.

DIVORCE—DECREE—DIVISION OF PROPERTY. Upon granting a wife a divorce, the court may award all the property, community and separate, to the wife.

COSTS—ON APPEAL. Where defects might have been readily cured by amendment in the court below, and appellant did not call the court's attention thereto, but had a right to first raise them on appeal, no costs will be allowed in the supreme court on reversing the judgment.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered March 28, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for divorce. Reversed.

Walter M. Harvey, for appellant.

Eugene Carr, for respondent.

[1]Reported in 92 Pac. 278.

RUDKIN, J.—This is an appeal from a decree of divorce, and the cause comes before us on the complaint and the findings made by the trial court. The respondent has moved to dismiss the appeal on several grounds, but we find no merit in the motion. The appellant had a lawful right to appeal on the judgment roll and question the sufficiency of the complaint and findings to support the judgment against him. The motion to dismiss is therefore denied.

Two errors are assigned: First, that the complaint did not state facts sufficient to constitute a cause of action or show that the court below had jurisdiction of the subject-matter thereof, because it was not alleged that the plaintiff had been a resident of the state for one year prior to the commencement of the action, or of Pierce county at the time of the commencement thereof; and second, that the court erred in awarding all of the separate property of the appellant of the value of about $2,400 to the respondent, for the support and maintenance of herself and child.

The complaint is undoubtedly defective in the matter complained of, as an allegation of the place of residence of the plaintiff is an essential one in an action for divorce in this state. *Luce v. Luce*, 15 Wash. 608, 47 Pac. 21. This defect in the complaint was not cured by the findings of the court, as they are equally silent on the question of the respondent's residence. An attempt was made to bring parts of the testimony to this court, but, inasmuch as the testimony was not embodied in a bill of exceptions or statement of facts, it forms no part of the record on appeal and cannot be considered by us. The complaint and findings being both deficient, and the testimony not being before us, we cannot indulge in any presumptions or deem the complaint amended to conform to the proofs, as there is nothing to amend by. The judgment must therefore be reversed.

The ruling of the court in awarding all of the property to the wife for the support and maintenance of herself and

child is fully warranted by the findings in the case. *Miller v. Miller*, 8 Wash. 605, 80 Pac. 816; *Clemans v. Western*, 39 Wash. 290, 81 Pac. 824; *Mitchell v. Mitchell*, 39 Wash. 431, 81 Pac. 913. There is no distinction between community and separate property in this regard. *Fields v. Fields*, 2 Wash. 441, 27 Pac. 267; *Webster v. Webster*, 2 Wash. 417, 26 Pac. 864.

The defects found in this record might readily have been cured by amendment in the court below, but we are satisfied they were never called to the attention of that court; and while the appellant has a lawful right to raise the objections in this court for the first time, we will not encourage the practice by allowing costs.

The judgment is reversed, and the cause remanded with directions to allow an amendment to the complaint, and to make findings on the question of the respondent's residence, based either on the proofs already received or upon such other testimony as the parties may offer. Neither party will recover costs on this appeal.

HADLEY, C. J., FULLERTON, CROW, MOUNT, ROOT, and DUNBAR, JJ., concur.

[No. 6895. Decided November 1, 1907.]

AMERICAN BONDING COMPANY, *Respondent*, v. S. S. LOEB, *Appellant*, PACIFIC BREWING AND MALTING COMPANY, *Intervener*.[1]

JUDGMENT — PERSONS CONCLUDED — WITNESSES — INDEMNITY—AUTHORITY OF AGENT TO ISSUE BOND—ESTOPPEL. A member of a transportation company who delivered stock of the company as a pledge for the purpose of securing a charter for the company, is concluded by a judgment against the company foreclosing the pledged stock, where he had knowledge of the suit, was a witness therein and had an opportunity to intervene and make the defense that he was acting as surety only and that the bond, to secure which the pledge was made, was issued by an agent without authority; especially where he had been personally interested in obtaining the bond and had accepted the benefits thereof.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered May 28, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a pledge. Affirmed.

Richard Saxe Jones, for appellant.

Campbell & Powell, for respondent.

DUNBAR, J.—One A. L. Campbell was an agent of the respondent American Bonding Company, and issued a bond in behalf of the respondent for a charter party entered into by Saunders, Ward & Company, and took security back from Saunders, Ward & Company. The appellant, Loeb, was a member of the transportation company for whose benefit the first bond was given. He became an officer of the transportation company to whom the charter party of the schooner Aberdeen was assigned, and said schooner was operated by said company. Twenty-five thousand dollars of the par value

[1]Reported in 92 Pac. 282.

of the capital stock of said company was delivered to the appellant Loeb, and afterwards sold by him for a valuable consideration. Loeb deposited one hundred shares of the capital stock of the Pacific Brewing and Malting Company as collateral security to protect the bonding company from loss on the bond furnished by it. The transportation company unsuccessfully conducted its business, and failed. Action was brought on the bond against the American Bonding Company, in San Francisco, California, and judgment rendered thereon, and this action is brought by the bonding company to foreclose the right of all parties to the shares of the capital stock of the Pacific Brewing Company deposited as aforesaid. Upon the hearing of the case, judgment was entered in favor of the bonding company, from which judgment this appeal is taken.

After the commencement of this action a considerable time elapsed before it was brought to trial, and in the meantime two amended complaints were filed. The case was finally heard on the second amended complaint and the answer which raised the issues thereon.

It is insisted by the counsel for appellant that the allegations of the different complaints are conflicting, and that the court erred in adopting the theory of the second amended complaint. An examination of the different complaints, however, fails to convince us that there was anything either wrong, suspicious, or unusual in the filing of the specified complaints. In any event, the case is for trial here on the issues which were made by the final pleadings.

Without especially reviewing or analyzing the testimony, which we have carefully examined in detail, we are satisfied that the appellant's main contention, that the findings of the court are against the testimony, cannot be sustained; but that, on the contrary, they are justified by undisputed testimony offered by respondent and by much of the testimony offered by the appellant. The many cases cited by appellant to sustain the doctrine that the right of a surety is strictly

guarded by the courts, may be accepted as correctly stating the law without affecting the judgment in this case, for we are convinced, not only by the testimony of the respondent, but by the testimony of the appellant Loeb, that he was not a surety in the transaction which was the basis of the action. According to his own testimony he was a member of the Aberdeen Steamship Company, was primarily interested in obtaining a charter and in organizing the corporation, and that for a consideration he assigned the shares in controversy for the purpose of securing the charter. But even if he were a surety, his complaint that he was not bound by the California judgment, for the reason that he had no notice, is not tenable, for he admits that before he left Tacoma he was aware of the suit which was to be brought in San Francisco; that he went to San Francisco, attended the trial, and testified in the case. He does not testify, it is true, that he went there for the purpose of attending the trial or testifying in the case, but says that he was a traveler and happened to be there. But the fact remains that, before he left Tacoma, he was aware of the trial, and that he did go to San Francisco, attended the trial, and testified in the case. So that he, being a party vitally interested in the result of the litigation, had an opportunity to intervene and make the defense which he claims the respondent ought to have made, viz., that Campbell was not authorized to issue the bond in the first instance, or any other defense that would protect his ultimate rights.

It was held by this court in *Douthitt v. MacCulsky*, 11 Wash. 601, 40 Pac. 186, that a person may be bound by a decree though not a technical party to the action. And in *Shoemake v. Finlayson*, 22 Wash. 12, 60 Pac. 50, we held that a person who was a witness in an action, fully acquainted with the character and object and interested in the results, was estopped by the judgment as fully as if he had been a nominal party. The appellant attempts, but we think unsuccessfully, to distinguish these cases from the case at bar. All

cases, it is true, are of necessity somewhat different in circumstances. But the principles announced in the cases above cited, and the authorities therein quoted, we think are undoubtedly applicable in this case. The result of the California litigation of necessity affected the rights of appellant. He was there, participated in the trial as a witness, and if he thought that there was a defense to this action the interposition of which would protect him, it was his duty to make such defense. In addition to this, the appellant accepted the benefit of the bond which was issued by the respondent, and is not now in a position to be heard to question its authorization. The statute of limitations plainly has not run against this action, and so far as the items of expenditure which are incorporated in the judgment are concerned, they were provided for in the contract.

We are unable to discover any reversible error in the trial of the cause, and the judgment is affirmed.

HADLEY, C. J., ROOT, MOUNT, CROW, FULLERTON, and RUDKIN, JJ., concur.

[No. 6916. Decided November 1, 1907.]

WM. W. SEYMOUR, *Respondent*, v. G. A. LAFURGEY, *Appellant*.[1]

VENUE—LOCAL ACTIONS—REMOVAL OF TIMBER. An action to rescind a contract for the removal of standing timber is local, and a change of venue to the county of defendant's residence is properly denied.

INJUNCTIONS—TEMPORARY—TO PREVENT WASTE—REMOVAL OF TIMBER. The granting of a temporary injunction against the removal of standing timber, is discretionary, where the plaintiff contends that it is necessary to save the property from waste.

[1]Reported in 92 Pac. 267.

Appeal from an order of the superior court for Mason county, Linn, J., entered March 27, 1907, granting a tempo rary injunction against the removal of timber, after overruling a motion for a change of venue. Affirmed.

Eugene Carr and *N. Soderberg*, for appellant.

Frank D. Nash, for respondent.

ROOT, J.—This is an appeal from an order granting an injunction *pendente lite* against appellant's removing timber or property from certain premises. Appellant and respondent entered into a contract, whereby appellant purchased and agreed to remove certain standing timber from respondent's land situated in Mason county, and respondent permitted appellant to use a logging outfit situate upon said premises. Respondent, in his complaint, alleged that the defendant had violated the terms of the contract in many particulars, and brought this action to have said contract determined to be at an end, and for possession of the premises and property leased by said contract. Appellant appeared with a demurrer, and an affidavit and motion for change of venue to Pierce county, setting forth that he was a resident of that county. The trial court denied his motion, and this ruling is alleged as error. Subsequently another motion for a change of venue was made, upon the ground that most of the witnesses lived in Pierce county, and that for this and other reasons it would be much more convenient and less expensive to have the trial in said county. This motion was also denied.

It is urged by appellant that this is a transitory action and consequently not necessary to be tried in the county where the property is situated. We do not think this contention can be upheld. Logging contracts of this character certainly affect very materially the lands upon which the timber is growing. They contemplate that the person removing the timber must take possession of the land and use it while cutting and taking off such timber. It is the policy of our law that all transac-

tions affecting the title to real estate shall be matters of record in the county where such real estate is situated, so that any one concerned therewith may be informed as to the condition of its title by an examination of the public records in such county. We think that this contract affected the title to, and interests in, these lands in such a manner as to make an action for its forfeiture local in its character. Consequently the action would be properly brought and tried in Mason county.

As to the equities upon which the motion for temporary injunction was granted, there was considerable conflict in the contentions of the respective parties. We think, however, that the showing made by the plaintiff was sufficient to justify the trial court in making the order which it did. The statutes allow the trial court, in cases of this kind, much discretion in the matter of protecting the rights of all parties concerned during the pendency of an action. If the contentions of the respondent as to the conduct of the appellant were true, such a restraining order was certainly necessary to protect and save the property from waste and himself from serious loss. If these complaints should be found to be without cause, proper reparation could be made in the final disposition of the case, or otherwise.

Finding no error in the record, the judgment of the trial court is affirmed.

HADLEY, C. J., RUDKIN, FULLERTON, DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 6819. Decided November 4, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Chehalis County et al., Plaintiff*, v. THE SUPERIOR COURT FOR PACIFIC COUNTY *et al., Respondents.*[1]

COUNTIES—ESTABLISHMENT — STATUTES — CONSTITUTIONAL LAW—PRESUMPTIONS—VALIDITY. Under Const., art. 11, § 3, providing that no new county shall be established which shall reduce any county to a population of less than four thousand, or from a new county of less than two thousand, it cannot be assumed that the legislature has determined the prerequisite population, where the act attempting to create a new county contains provisions for taking a census to determine the population.

SAME—VALIDITY OF ACT—STATUTES—CERTAINTY. An act to create a new county out of a county bounded by several districts, is void for indefiniteness and uncertainty, where it provides that the petition and proceedings therefor shall be transmitted by the governor to the superior judge of "the next nearest judicial district adjoining the judicial district" in which the county in question is situated, there being nothing to determine what superior judge or district was intended (MOUNT and FULLERTON, JJ., dissenting).

Application filed in the supreme court June 13, 1907, for writs of prohibition to prohibit the superior court for Pacific county, Rice, J., from the exercise of functions imposed by an act providing for the creation of Grays Harbor county. Granted.

W. H. Abel, Jas. M. Ashton, George Dysart, W. H. Hayden, and *Morgan & Brewer*, for petitioners, contended, among other things, that the act is unconstitutional because it affirmatively appears upon its face that the legislature did not inform itself as to, nor determine the population of the new county, nor the remaining Chehalis county. Const. art. 11, § 3; Laws 1907, p. 62, §§ 2, 4. When the record states the evidence or makes an averment with reference to a judicial fact, it will be understood to speak the truth on that point.

[1]Reported in 92 Pac. 345

Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; 1 Herman, Estoppel, 447. But where a want of jurisdiction affirmatively appears by the record, then the judgment, even of a court of general jurisdiction, is void. *Savage v. Sternberg*, 19 Wash. 679, 54 Pac. 611, 67 Am. St. 751; *Sturgiss v. Dart*, 23 Wash. 244, 62 Pac. 858; *Wallace v. Grant*, 27 Wash. 130, 67 Pac. 578; *In re Yamashita*, 30 Wash. 234, 70 Pac. 482, 94 Am. St. 860, 59 L. R. A. 671; Freeman, Judgments (4th ed.), § 116. The fact that a court does act involves the adjudication that it has power to act. *Clary v. Hoagland*, 6 Cal. 685; *Graff v. Louis*, 71 Fed. 591; *Florentine v. Barkin*, 2 Wall. 210, 17 L. Ed. 783. The exercise of jurisdiction implies the finding a necessary jurisdictional fact. Van Fleet, Coll. Attack, § 62; *Osborne v. Sutton*, 108 Ind. 443, 9 N. E. 410; *Manier v. Trumbo*, Fed. Cases, No. 18,309; 11 Cyc. 700; *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717; *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340. It is the duty of the court to deny its own jurisdiction on its own motion, where the record discloses a want of jurisdiction. 11 Cyc. 701; 6 Current Law 313; *Gorman-Wright Co. v. Wright*, 134 Fed. 363; *United States v. Barrett*, 135 Fed. 189; *Macey Co. v. Macey*, 135 Fed. 725. If evidence of a fact was required it must be supposed that it was before the legislature when the act was passed. Cooley, Const. Lim. (5th ed.), p. 222; *State ex rel. Attorney General v. County of Dorsey*, 28 Ark. 378; *Ramsey v. People*, 19 N. Y. 41. The new county could not be created until the legislature informed itself of the existence of the prerequisite facts. *De Camp v. Eveland*, 19 Barb. 81; *Lusher v. Scites*, 4 W. Va. 11; *Fraser v. James*, 65 S. C. 78, 43 S. E. 292; *Board of Supervisors Jackson County v. Brush*, 77 Ill. 59; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453, 2 N. W. 639; *Belo v. Com'rs of Forsythe*, 76 N. C. 489. Where a power is granted upon condition, a compliance with that condition is an essential prerequisite to a valid execution of the power. *Hickey*

v. Chicago etc. R. Co., 6 Ill. App. 172; *North Chicago St. R. Co. v. Cheetham*, 58 Ill. App. 318; *Hunt v. Chicago etc. R. Co.*, 121 Ill. 638, 13 N. E. 176; *Com'rs of Knox County Ind. v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Runnsey v. People*, 19 N. Y. 41; Cooley, Const. Lim. (5th ed.), p. 245. No petition was presented to, nor acted upon by the legislature at or prior to the passage of the act. Const., art. 11, § 3; Laws 1907, p. 62, §§ 2, 3. No general law applicable to the whole state prescribing the conditions upon which territory can be stricken from any county has ever been enacted in this state, and unless such has been done a special act creating and establishing a new county by striking territory from any county is unconstitutional. Bal. Code, §§ 269-274, 4859 (P. C. §§ 3915-3920, 315). The act is unconstitutional because it delegates other than judicial power to a judge. Cooley, Const. Lim. (5th ed.), p. 139; 8 Cyc. 806; *Patterson v. Temple*, 27 Ark. 202; *Evansville v. State ex rel. Blend*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; 4 Words & Phrases 3860. The question of the division of a county is a political question and not a judicial one. *Riverside County v. San Bernardino County*, 134 Cal. 517, 66 Pac. 788; *Board of Com'rs v. Perkins*, 5 Wyo. 166; 11 Cyc. 343, 344, 349. A judicial act is one confined to judicial officers to be exercised in a judicial way. *Supervisors of Onondaga v. Briggs*, 2 Denio 26; *In re Saline County Subscription*, 45 Mo. 52, 100 Am. Dec. 337. There can be no judicial action without notice of the proceedings. 11 Cyc. 671; *Galpin v. Page*, 85 U. S. 350, 21 L. Ed. 959, 3 L. R. A. 625; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Wilson v. Seattle*, 2 Wash. 543, 27 Pac. 474; Cooley, Const. Lim. (5th ed.), p. 579; 3 Blackstone 283; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; 22 Am. & Eng. Ency. Law (2d ed.), 142; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590, 32 L. Ed. 1001. The acts to be performed by the judge were not judicial acts. *Board of Supervisors v. Todd*, 97 Md. 247, 54 Atl. 963, 99 Am. St.

438, 62 L. R. A. 809; *State ex rel. Hardy v. Clough*, 64 Minn. 378, 67 N. W. 202. And on the ground that the question was political, the courts have been prohibited from fixing the territory out of which cities, towns, and counties shall be created requiring that question to be determined by the legislature, or legislative or executive bodies. *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; *In re Village of Ridgefield Park*, 54 N. J. L. 288, 23 Atl. 674; *State v. Simons*, 32 Minn. 540, 21 N. W. 750; *Galesburg v. Hawkinson*, 75 Ill. 152; *People v. Town of Nevada*, 6 Cal. 143; *Christlieb v. County of Hennepin*, 41 Minn. 142, 42 N. W. 930. In the formation of a new school district, the facts to be determined by the county commissioners, were held to be legislative, and in no manner judicial. *Lemont v. County of Dodge*, 39 Minn. 385, 40 N. W. 359; *Krieschel v. Board of Com'rs, Snohomish County*, 12 Wash. 428, 41 Pac. 186. The removal of a county seat is political and the courts have no right to interfere. *Robey v County Commissioners*, 92 Md. 150, 48 Atl. 48; *State v. Ueland*, 30 Minn. 29, 14 N. W. 58. Courts are powerless to establish county lines, or add to or take from territorial area of counties. This can only be done by another branch of the state government. 8 Cyc. 818, 835, 845; *Shaffner v. Young*, 10 N. D. 245; *Norwalk Street R. Co.'s Appeal*, 69 Conn. 576, 39 L. R. A. 794. Only strictly judicial duties can be performed by supreme and superior courts. 8 Cyc. 807, par. 3; *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565; *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852; *People v. Sanderson*, 30 Cal. 160; *Ex Parte Griffiths*, 118 Ind. 83, 20 N. E. 513, 10 Am. St. 107, 3 L. R. A. 398; *State ex rel. Hovey v. Noble*, 118 Ind. 350, 21 N. E. 244, 10 Am. St. 143, 4 L. R. A. 101; *Lewis v. Webb*, 3 Me. 326; *Oakley v. Aspinwall*, 3 N. Y. 547. The taking effect of the act and the creation of Grays Harbor county is made to take effect upon the future ascertainment of a set of facts in existence prior to the passage of the act and for which reason it is unconstitutional. Const., art. 11,

§ 10; *State v. Young*, 29 Minn. 474, 9 N. W. 737; *Thornton v. Territory*, 3 Wash. Ter. 482, 17 Pac. 896. The power to make laws is legislative and an act which gives the county court the right to suspend it is void. *State v. Field*, 17 Mo. 529, 59 Am. Dec. 275. The law is ambiguous and incapable of construction or interpretation. Black, Statutory Construction, § 35; *State v. Partlow*, 91 N. C. 550, 49 Am. Rep. 652; *Drake v. Drake*, 15 N. C. 110; *Ex Parte Jones*, 49 Ark. 110, 4 S. W. 639; *Green v. Wood*, 7 Ad. & El. (N. S.) 178; *State ex rel. Crow v. West Side St. R. Co.*, 146 Mo. 155, 47 S. W. 959; *In re Hendricks*, 60 Kan. 796, 57 Pac. 965; *Hilburn v. St. Paul etc. R. Co.*, 23 Mont. 229, 58 Pac. 551, 811; *Matthews v. Murphy*, 23 Ky. Law 750, 63 S. W. 785; *Commonwealth v. Louisville & N. R. Co.*, 20 Ky. Law 491, 46 S. W. 700; *State ex rel. Long v. Brinkman*, 3 Ohio C. D. 710; *In re House Resolution*, 12 Colo. 359, 21 Pac. 485; *Ward v. Ward*, 37 Tex. 389; *Commonwealth v. Bank of Pennsylvania*, 3 Watts & S. 173; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 55 S. W. 627, 77 Am. St. 756, 48 L. R. A. 265; *Cook v. State*, 26 Ind. App. 278; *Louisville & N. R. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129, 59 Am. St. 457, 33 L. R. A. 209; *State v. Taylor*, 7 S. D. 533, 64 N. W. 548; *Johnston v. State*, 100 Ala. 32, 14 South. 629; *Holmberg v. Jones*, 7 Idaho 752, 65 Pac. 563; *Matter of McGinniss' Estate*, 13 Misc. Rep. 714, 35 N. Y. Supp. 820; *State v. Stevens*, 21 Kan. 160.

John C. Hogan, J. B. Bridges, Harold Preston, and *Graves, Palmer & Murphy*, for respondents, contended, *inter alia*, that Chehalis county has no legal standing as a party to this suit. Bal. Code, §§ 265, 266, 342-349, 466, 4757, 5673; *Kitsap County v. Carson*, 1 Wash. Ter. 419; *Stowe v. State*, 2 Wash. 124, 25 Pac. 1085; *State ex rel. Rochford v. Superior Court Yakima County*, 4 Wash. 30, 29 Pac. 764; *Presby v. Klickitat County*, 5 Wash. 329, 31 Pac. 876; *Smith v. Lamping*, 27 Wash. 264, 68 Pac. 195; *State ex rel. Barton v. Hopkins*,

14 Wash. 59, 44 Pac. 134, 550; *Dirks v. Collin*, 37 Wash. 620, 79 Pac. 1112. Jurisdiction is presumed. *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20; *Nolan v. Arnot*, 36 Wash. 101, 78 Pac. 463; *Bock v. Sanders*, 46 Wash. 462, 90 Pac. 597. The legislature had the power to fix requirements in addition to those prescribed by the constitution. *Alexander v. People*, 7 Colo. 155, 2 Pac. 894; *State ex rel. Saunders v. Clark*, 59 Neb. 702, 82 N. W. 8; *State ex rel. Packard v. Nelson*, 34 Neb. 162, 51 N. W. 648. The fact in regard to population may be determined by a body or tribunal other than the legislature. *Garfield v. Brayton*, 33 Iowa 16; *State v. St. John*, 21 Kan. 591; *Woods v. Henry*, 55 Mo. 560; *State ex rel. Brayton v. Merriman*, 6 Wis. 17; *State ex rel. Pennell v. Armstrong*, 30 Neb. 493, 46 N. W. 618, 9 L. R. A. 382; *Union County v. Knox County*, 90 Tenn. 541, 18 S. W. 254; *State ex rel. Spaulding v. Elwood*, 11 Wis. 17; *Marion County v. Grundy County*, 37 Tenn. 490; *Bridgenor v. Rodgers*, 41 Tenn. 258; *Bittle v. Stuart*, 34 Ark. 224; *McMillan v. Hannah*, 106 Tenn. 689, 61 S. W. 1020; *Roane County v. Anderson County*, 89 Tenn. 259, 14 S. W. 1079; *Cheatham County v. Dickson County* (Tenn.), 39 S. W. 734; *Kumler v. Board of Supervisors*, 103 Cal. 393, 37 Pac. 383; *Commonwealth ex rel. Burns v. Handley*, 106 Pa. St. 249; *Chicago Terminal etc. R. Co. v. Greer*, 223 Ill. 104, 79 N. E. 46, 114 Am. St. 313. The provision relating to the petition is constitutional. *State ex rel. Pennell v. Armstrong*, 30 Neb. 493, 46 N. W. 618, 9 L. R. A. 382; *State ex rel. Anderson v. Newman*, 24 Neb. 40, 38 N. W. 40; *Ford v. North Des Moines*, 80 Iowa 626, 45 N. W. 1031; *Guild v. Chicago*, 82 Ill. 472. The act does not delegate legislative powers to the superior court. *People v. Provines*, 34 Cal. 520; Indiana Constitution, art. 3; *Grusenmeyer v. Logansport*, 76 Ind. 549, *Forsythe v. Hammond*, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576; Id., 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095; Utah Constitution, art. 6, § 1; *Young v. Salt Lake City*, 24 Utah 321, 67

Pac. 1066; *State ex rel. Matson v. Superior Court Skagit County*, 42 Wash. 491, 85 Pac. 264, *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; *Edgewater v. Liebhardt*, 32 Colo. 307, 76 Pac. 336; *People v. Fleming*, 10 Colo. 553, 16 Pac. 298; *Eldred v. Johnson*, 18 Colo. App. 384, 71 Pac. 891; *Kayser v. Breman*, 16 Mo. 88; *State ex rel. Hagestad v. Sullivan*, 67 Minn. 379, 69 N. W. 1094; *Chicago Terminal etc. R. Co. v. Greer, supra; Village of Fairview v. Giffee*, 73 Ohio St. 183, 67 N. E. 865; *Ross v. Board of Chosen Freeholders*, 69 N. J. L. 291, 55 Atl. 310; *Nash v. Fries*, 129 Wis. 120, 108 N. W. 210. An act providing for the annexation of territory to cities under certain conditions and providing for the determination of those conditions by the court is not open to the objection that it confers legislative powers upon the court. *Burlington v. Leebrick*, 43 Iowa 252; *Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813; *Whittaker v. Venice*, 150 Ill. 195, 37 N. E. 240; *Young v. Carey*, 184 Ill. 613, 56 N. E. 960; *Callen v. Junction City*, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736; *Eskridge v. Emporia*, 63 Kan. 368, 65 Pac. 694; *Mendenhall v. Burton*, 42 Kan. 570, 22 Pac. 558; *State ex rel. Matson v. Superior Court Skagit County*, 42 Wash. 491, 85 Pac. 264; *State v. Ueland*, 30 Minn. 29, 14 N. W. 58; *Brown v. Turner*, 70 N. C. 93. The act may lawfully provide that the county shall not come into existence except upon a vote of a majority of its voters. *People v. Reynolds*, 10 Ill. 1; *People ex rel. Graves v. McFadden*, 81 Cal. 489, 22 Pac. 851, 15 Am. St. 66; *People ex rel. Love v. Nally*, 49 Cal. 478; *Jackson v. State*, 131 Ala. 21, 31 South. 380; *Black v. Board of Com'rs of Buncombe County*, 129 S. C. 121, 39 S. E. 818; *State ex rel. Spaulding v. Elwood*, 11 Wis. 17. A law may be made conditional. *Hand v. Stapleton*, 135 Ala. 156, 33 South. 689; *Attorney General ex rel. Battishill v. Township Board*, 143 Mich. 523, 107 N. W. 87; *Aurora v. United States*, 7 Cranch. 382, 3 L. Ed. 378; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495; *Locke's Appeal*, 72 Pa. St. 491,

13 Am. Rep. 716; *Bull v. Read*, 13 Gratt. (Va.) 78; *Walton v. Greenwood*, 60 Me. 356; *State v. Parker*, 26 Vt. 357; *Peck v. Weddell*, 17 Ohio St. 271; *Alcorn v. Hamer*, 38 Miss. 652. The legislature may prescribe the rule for determining the population, and the announcement of any rule which is in accordance with the spirit and meaning of the provision, will be upheld, although there might be a difference of opinion as to whether or not such was the best rule. *Wilson v. Bartlett*, 7 Idaho 271, 62 Pac. 416; *Williamson v. Russey*, 73 Ark. 270, 84 S. W. 229; *Board of Com'rs of Jackson County v. State ex rel. Brown*, 147 Ind. 476, 46 N. E. 908; *Taylor v. Taylor*, 10 Minn. 107; *People ex rel. Mitchell v. Warfield*, 20 Ill. 160; *Everett v. Smith*, 22 Minn. 53; *State ex rel. Teague v. Edwards*, 107 La. 49, 31 South. 381; *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609; *State ex rel. Dustin v. Rusk*, 15 Wash. 403, 46 Pac. 387; *State ex rel. Saunders v. Clark*, 59 Neb. 702, 82 N. W. 8; *State ex rel. Packard v. Nelson*, 34 Neb. 162, 51 N. W. 648.

Root, J.—At the last session of the legislature a bill was passed looking to the creation of a county to be known as Grays Harbor county, and to be composed of territory taken from the present county of Chehalis. Laws 1907, p. 62. This is an application for writs of prohibition against the superior court in and for the counties of Lewis, Pacific, and Wahkiakum, and the Honorable A. E. Rice, judge of said court, to prohibit him and them from exercising any of the functions alleged to be imposed upon him or them by said act. The first section of said act employs the following language:

"All that part of Chehalis county lying and being west and north of the following described line [here follows the entire description] shall be and is hereby created and established as the county of Grays Harbor: *Provided, however*, That the said Grays Harbor county is hereby created as aforesaid subject to the requirements of the constitution of the state of Washington in the respect to the establishment of new counties, and subject to an ascertainment of the fact of such com-

pliance as hereinafter provided, and that the creation of Grays Harbor county hereby shall not become operative to establish said county until such compliance shall have been so had and the fact of such compliance so ascertained."

Section 2 provides that any qualified voter within the territory of the proposed new county may, within three months, present to the governor a petition showing that it is signed by a majority of the voters within said proposed new county, and praying that the creation of the new county may be deemed fully established when the constitutional provisions are complied with; further providing that said petition shall be accompanied by a bond in the sum of $1,000 to cover costs of proceedings in case the county should not be established.

Section 3 provides:

"The governor shall forthwith transmit said petition to the superior judge of the next nearest judicial district adjoining the judicial district in which said county of Chehalis is now situate,"

and said judge is required to examine the petition and ascertain if it contains a sufficient number of signatures, and as to whether the striking of the territory will leave Chehalis county with a population of less than 4,000, and whether the territory of the proposed new county contains a population of 2,000 or more; and provides that said judge may, in his discretion, appoint an elector and freeholder, or electors and freeholders, residing in the territory of the proposed new county, to enumerate the population of Chehalis county, or any part thereof, so as to show the number of people living in each portion; and the duties of said enumerator or enumerators are prescribed.

Section 4 provides that, if the judge finds that there are 2,000 or more inhabitants within the boundaries of the proposed new county, and that there shall remain 4,000 or more inhabitants in the remaining portion of Chehalis county, he shall thereupon make a decree setting forth that the provisions of the constitution have been complied with. Upon the

filing of such decree, the clerk of the court is to transmit certified copies thereof to the county commissioners of Chehalis county, to the governor, and to the secretary of state. Section 5 provides that the governor, on receipt of said certified copy, shall make a proclamation declaring Grays Harbor county to be established. Other sections of the act provide for the organization of the new county, the apportionment of its indebtedness, etc.

Petitioners assert that the act is unconstitutional or otherwise void, and assign many reasons for this contention. It will be unnecessary to pass upon more than one. Article 11, section 3, of the state constitution, reads as follows:

"No new county shall be established which shall reduce any county to a population less than four thousand (4,000), nor shall a new county be formed containing a less population than two thousand (2,000). There shall be no territory stricken from any county unless a majority of the voters living in such territory shall petition therefor, and then only under such other conditions as may be prescribed by a general law applicable to the whole state."

It is urged by petitioners that the bill could not be passed until the legislature had ascertained the population of the proposed new county and of that portion which would remain in the old county after the creation of the new. It must, of course, be conceded that the constitutional provision is a limitation upon the power of the legislature to create a county. Respondents contend, however, that the county is not "established" by the mere passing of the bill, but that the legislature expressly provided a means by which all the constitutional requirements should be met; that it must be presumed that the legislature complied with all the requisites of the constitution, and ascertained the population of these portions of the territory into which the old county was to be divided. In the case of *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717, this court held that, where the record was silent as to what the legislature had done in the premises, it would be pre-

sumed that that body had informed itself as to those matters which the constitution required it to have knowledge of, before passing the law.

It is urged by the petitioners that such presumption cannot be indulged in this case, for the reason that the provisions of the act itself show that the legislature had not informed itself as to the population of the two portions into which the territory of the former county was to be divided. We think this contention must be upheld. The act makes express provision for the ascertainment of these matters by another authority, and goes into detail as to how this shall be accomplished. It cannot be supposed that the legislature would do an idle thing. If it had already ascertained these matters, the ascertainment of which was essential to the formation and establishment of a new county, it cannot be thought that provisions would be placed in the bill for the subsequent ascertainment thereof by another body, officer, or person. It is strenuously urged by petitioners that the legislature was obliged to ascertain the population of these portions of the county before it passed the bill, and that as it affirmatively appears that it did not do so, the act must fall; that the attempted submission of this matter to the court or to a judge of a court was an attempted delegation of legislative power that was not delegable, and that it was an imposition upon the court and the judge thereof of nonjudicial duties which could not be legally exercised by a court or judge. In the case of *Farquharson v. Yeargin*, *supra*, this court said:

"The creation of a new county is an exercise of legislative power subject to the limitations referred to [the constitutional provisions above quoted]. Before this power can be rightfully exercised, it must be made to appear to the legislature affirmatively that the new county contains a population of not less than two thousand, and that by the creation of the new county the population of the county from which the new county is taken is not reduced to less than four thousand. When these facts are made to appear to the satisfaction of

the legislature, then the act creating the proposed new county may be passed."

If this be the law of the state, and if a new county can be at all legally created of territory stricken from an existing county, except under the provisions of a general law therefor, it must clearly appear that the act in question is obnoxious to the constitution. But it is insistently urged by respondents that this portion of the opinion is *obiter dictum*. Without passing upon this, but for the moment assuming that it is not controlling in this case, let us examine the provisions whereby the legislature sought to have an ascertainment made of the facts which the constitution makes a prerequisite to the establishment of a new county. This act sought to provide for the ascertainment of these facts by "the superior judge of the next nearest judicial district in which said county of Chehalis is now situate." Petitioners contend that this is absolutely indefinite and uncertain; that it cannot be ascertained from this or any other language of the statute who was the judge intended to be indicated by the legislature. Respondents answer this by saying that it was incumbent upon the governor to ascertain which was the "next nearest judicial district," and that his decision must be unquestionable and final.

We cannot bring ourselves to agree with this contention. We think the language shows that the legislature intended one of the three judges who preside respectively over the three districts adjoining Chehalis county. The question is, which one of these three did it have in mind and intend to designate? When the legislature itself did not determine essential facts, and sought to have them determined by some other authority, if it had the power at all to so have them ascertained, it was certainly incumbent upon it to clearly indicate what court, judge, official, or person should make such ascertainment. The creation of a new county from the territory of another is an important political event, and of special interest

to all of the inhabitants of that territory, and each and all have the right to insist that, in the exercise of its power in that direction, the legislature shall comply with the mandates of the people as given in the constitution; and where it seeks to make a law contingent upon the ascertainment of a certain fact required by the constitution to exist before the law can become effective, its language must be such as to indicate clearly whom it intends as that court, judge, official, or person. Responsibility must be fixed and definite.

In this case there are three judicial districts (if there be any such thing as "judicial districts" in this state), each of which adjoins the judicial district in which Chehalis county is situated. Bounding Chehalis county upon a considerable portion of its north line is Jefferson county, which, with other counties, has a judge presiding over its superior court. Bounding Chehalis county on the east and partly on the north are Mason and Thurston counties, which for judicial purposes are combined, having a superior court judge presiding over the court in each county. Upon the south it is bounded by Lewis and Pacific counties, both of which are, together with Wahkiakum, in a judicial district presided over by the respondent, Honorable A. E. Rice. As a mathematical and geographical proposition, and consequently as an accepted legal fact, it is impossible to say that any one of these districts is nearer to Chehalis county than either of the other two. It was therefore impossible for the governor, or any court, officers, or person, to know from the language of the act what judge was intended by the legislature. In the exercise of any public function, the person, board, court, or other body seeking to exercise such power must, if his act is to be valid, be able to point to the legal authority justifying, requiring, or permitting such act. In this case there can be no such authority shown. Could a writ a mandamus run against Judge Rice if he had refused to act? We apprehend not. His name is not used. He is in no manner described or indicated.

His judicial district is not mentioned. Nor is anything said whereby it can be supposed that the legislature was speaking with reference to the judge of such district. Under the writs in this case, it is incumbent upon the respondents to show that Judge Rice is the person authorized by this act to ascertain the facts and do the other things referred to therein. This has not been done. It cannot be done. The act is entirely indefinite and uncertain. Judge Still of the district including Jefferson county, or Judge Linn of the district comprising Mason and Thurston, is as fully and definitely indicated as Judge Rice. The statute, being thus indefinite and uncertain, is incapable of enforcement; and no jurisdiction being shown in Judge Rice, the writs must issue, and it is so ordered.

HADLEY, C. J., DUNBAR, CROW, and RUDKIN, JJ., concur.

MOUNT, J. (dissenting)—I cannot agree to the conclusion reached by the majority of the court in this case. The only restriction upon the legislature to create a new county is found in the words of the constitution:

"No new county shall be established which shall reduce any county to a population less than four thousand (4,000) nor shall a new county be formed containing a less population than two thousand (2,000)." Const., art. 11, § 3.

The remaining portion of that section refers solely to striking territory from one existing county and adding it to another existing county. The words "established" and "formed," as used in this provision, seem clear. They were used advisedly and mean finally established or finally formed. If the framers of the constitution meant to restrict the legislature from passing an act under which a new county might thereafter be established or formed, they used very inapt words to convey that idea. In my opinion no such intention is manifested. The expression quoted from *Farquharson v. Yeargin*, *supra*, that "when these facts are made to appear to the satisfaction of the legislature, then the act creating the proposed new county may be passed," is not warranted by the constitu-

tion, is dictum, and in my opinion, wrong if it is intended to apply to all cases. Such construction of the constitution would preclude the passage of a general law for the creation of new counties thereafter. The legislature is authorized to create or establish a new county either by special act or general law, and the facts in regard to population may be determined by the legislature, either before the passage of a special act finally establishing the county, or after the passage of the act where the county is not finally established by the terms of the act. In the latter event, the facts must be determined by some agent of the legislature before the county is finally established. I do not read the majority opinion as deciding against these views, but the decision is based solely upon the conclusion that the agent to ascertain the facts is not definitely pointed out.

The court takes notice of the fact that there are three judicial districts "adjoining the judicial district in which said county of Chehalis is now situated," and therefore concludes that there can be no next nearest judicial district because all three are equally near. This would probably follow if no further provision had been made. But the act provides that the governor shall transmit the petition to the judge next nearest. This, it seems to me, gives the governor power under reasonable construction, to determine which judge is next nearest where there are a number of judges in districts in theory equally near. When the governor designates one of that number, his selection under such conditions must be final. This point in itself is not of sufficient importance to invalidate the whole act; especially when it is remembered that courts will not invalidate a law where by reasonable construction it may be held valid. I therefore dissent.

FULLERTON, J., concurs with MOUNT, J.

[No. 6873. Decided November 4, 1907.]

H. Christenson, *Appellant*, v. Mary Raggio *et al.*, *Respondents*, A. M. Hoover *et al.*, *Defendants*.[1]

Vendor and Purchaser—Bona Fide Purchasers—Records—Mortgages—Satisfaction. The fact that purchasers of property recorded their deed, before satisfaction of a mortgage by one holding an unrecorded assignment of the mortgage, does not prevent their being *bona fide* purchasers, where the assignment had been exhibited to them and arrangements made for its record, and they paid no part of the purchase price until after record of the assignment and satisfaction of the mortgage.

Mortgages — Assignment — Record — Satisfaction. Under Bal. Code, § 4565, authorizing satisfaction of a mortgage by an assignee after record of his assignment, the purchaser of the property may rely on such a satisfaction, without requiring production of the negotiable paper which the mortgage secured.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 11, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

S. S. Langland, for appellant.

Fred H. Peterson and *H. C. Force*, for respondents.

Crow, J.—This action was commenced by H. Christenson against A. M. Hoover, Hattie Hoover, his wife, Gervain Minaglia, E. A. MacKay, Mary Raggio, and Stefano Raggio, her husband, to foreclose a mortgage on real estate. The evidence shows, that on January 31, 1901, the defendants A. M. Hoover and wife executed and delivered to one S. J. Teachnor their note for $300, secured by their mortgage deed on lot 3 in block 8, McAllister's addition to the city of Seattle; that the mortgage was recorded; that on February 19, 1901,

[1]Reported in 92 Pac. 348.

S. J. Teachnor, by written assignment, executed and delivered, transferred the note and mortgage to the defendant E. A. MacKay, who did not then record such assignment; that on February 25, 1901, without surrendering his own assignment, MacKay procured the mortgagee, Teachnor, to execute another written assignment to the plaintiff Christenson, which he, MacKay, delivered with the note and mortgage to plaintiff for a valuable consideration; that plaintiff did not then record his assignment; that the record title to the property thereafter passed by mesne conveyances to one Averill Beavers, who, on October 1, 1901, sold to the defendant Mary Raggio; that she employed an attorney to examine the title; that he discovered the mortgage lien then standing of record in the name of the original mortgagee; that the defendant Mary Raggio and her attorney were then informed by the defendant MacKay that he held an assignment of the mortgage, which he exhibited to them; that he stated the mortgage note had been paid, and that he would record his assignment and satisfy the mortgage of record; that on October 2, 1901, at 10:57 o'clock, a. m., Mary Raggio recorded her deed from Averill Beavers; that at 2:41 o'clock p. m. on the same day, MacKay filed his assignment for record and satisfied the mortgage; that immediately thereafter Mary Raggio paid the purchase money to her grantor Averill Beavers; that she then had no knowledge of the plaintiff's claim, and that the plaintiff did not record his assignment until May 19, 1906, immediately prior to the commencement of this action.

The plaintiff alleged that the purported assignment held by MacKay had been obtained by fraud; that MacKay never owned or had possession of the note; that the pretended satisfaction executed by him was null and void; and that the plaintiff had no knowledge of such satisfaction until about to foreclose his mortgage. Hoover and wife were not served. The only defense was made by the defendants Mary Raggio and Stefano Raggio, her husband, who claimed to be *bona*

fide purchasers. The trial court found in their favor and dismissed the action. The plaintiff has appealed.

The only question to be considered is whether respondents were *bona fide* purchasers of the property, free and clear of appellant's mortgage lien. Appellant contends they were not, for the reason that at the time they purchased the property and recorded their deed, they had actual and constructive notice of the mortgage which stood of record in the name of the original mortgagee without assignment or cancellation. If we correctly understand appellant's position, it is that as respondents recorded their deed during the morning hours of October 2, 1901, and as the assignment to MacKay and the satisfaction executed by him were not recorded until the afternoon of the same day, they purchased subject to the mortgage lien. It is undisputed, however, that respondents having seen MacKay's assignment, arranged for its record and the entry of satisfaction prior to the filing of their deed, and that they did not pay any of the purchase money to their vendor until after such record and satisfaction. No evidence was introduced tending to show that the respondents had any knowledge of the plaintiff or his claim. These facts show respondents to have been *bona fide* purchasers for value, and entitled to rely on the record of MacKay's assignment and satisfaction.

Appellant further claims that the assignment to MacKay was not sufficient to transfer both the note and mortgage. Although such assignment discloses one or two slight inaccuracies, we find no merit in this contention, but hold that it was sufficient to transfer not only the mortgage, but also the note.

The appellant further contends that it was the duty of the respondents when they purchased the property and learned that the mortgage was unsatisfied, to have ascertained who was then the owner and holder of the note; that where a mortgage secures a negotiable promissory note, a mortgagor or subsequent parties dealing with the title are chargeable with notice

that such note may have been transferred; that if they make payment without requiring its production, they do so at their peril, and that in case the note has been assigned, the payments so made afford no protection as against the assignee and holder of the note. The respondents Raggio were not making payment of the note. They were purchasing the property from Averill Beavers to whom they paid its full value. They were under no obligation to ascertain who then held the note.

Prior to the enactment of Bal. Code, § 4565 (P. C. § 6557), and in the absence of any act authorizing or requiring the record of an assignment of a mortgage, this court, in *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746, in substance announced the doctrine for which appellant now contends. See, also, *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. 742. In chapter 23 of the Laws of 1897, at page 23, the legislature, however, enacted Bal. Code, § 4565, *supra*. Since then any person to whom a mortgage has been assigned has been authorized, after record of his assignment in the office of the auditor of the proper county, to acknowledge satisfaction and discharge the mortgage of record. This is exactly what the defendant MacKay did under the authority of his recorded assignment, and the respondents having ascertained that his assignment had been recorded, and that he had entered satisfaction, before they made any payment of purchase money to their vendor, they are now protected against any lien claimed by the appellant who failed to record his assignment for a period of more than five years.

The judgment is affirmed.

Hadley, C. J., Rudkin, Fullerton, and Dunbar, JJ., concur.

Mount and Root, JJ., took no part.

[No. 6735. Decided November 5, 1907.]

CLARENCE E. WILLIAMS, *Respondent*, v. ELBERT PEDERSEN, *Appellant*, CHARLES F. HANSEN, *Defendant*.[1]

PARTNERSHIP—TERMINATION—ABSENCE—EXTRA COMPENSATION. A partnership to cut certain timber is not terminated by temporary absence of one partner; and mere inequality of service is not alone ground for compensating the one doing the greater service, in the absence of an express or implied agreement therefor.

Appeal from a judgment of the superior court for Pacific county, Irwin, J., entered October 18, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for the dissolution of a partnership, and for an accounting. Affirmed.

W. H. Abel, for appellant.

Welsh & Welsh, for respondent.

HADLEY, C. J.—This is an action between partners for an accounting, settlement, and dissolution. The partners conducted a logging business upon the Nema river, in Pacific county, Washington. The partnership at first consisted of the plaintiff, Williams, and the defendants, Pedersen and Hansen. After the firm business had continued a few weeks, Hansen dropped out, and it is conceded that thenceforward he was out of the firm; and that, during the time he was with them, the partnership, composed of the three, cut and placed in the river seventy-eight thousand feet of logs, one-third of the net proceeds of which each of the three partners is entitled to receive. After Hansen left, Williams and Pedersen continued operations as a firm. The court found that they cut three hundred and thirty thousand eight hundred feet, board measure, of sawlogs, and that of the net proceeds from the last-mentioned logs each of the two last-named partners

[1]Reported in 92 Pac. 287.

is entitled to receive one-half. It is conceded that Hansen received his share of the proceeds from the first-mentioned lot of logs, and that he is not entitled to any share in the proceeds from the logs cut after he left. Pedersen was to receive one dollar per thousand stumpage for the logs cut. The logs were sold to the Day Lumber Company, and Pedersen collected the proceeds of the sales, with the exception of $140 collected by Williams. The court found that Williams had also received in other ways the further sum of $107.50, making in all $247.50 received by him. After allowing Pederson for stumpage, towage, and expenses, the court found that there is a balance in his hands belonging to Williams as follows: From the Pedersen, Hansen and Williams logs, $114.92; and from the Pedersen and Williams logs $425.76: in all the sum of $540.68. Judgment was entered in favor of Williams against Pedersen for the last-named sum, and for the dissolution of the partnership. Pedersen has appealed.

It is contended that the court erred in its findings. This contention arises chiefly from appellant's claim that respondent was away much of the time while the Pedersen and Williams logs were being cut, and appellant urges that respondent is not entitled to share in logs cut while he was away. The evidence sharply conflicts as to the amount of time respondent was absent in person. His testimony was to the effect that he was there practically all the time, and that when he was away his brother worked in his place. Nothing in the record indicates that the court should not have accepted respondent's testimony as true, and, if true, he reasonably did his share of the work, or caused it to be done. The partnership had not been dissolved and its work continued, even under appellant's theory, at such times as respondent was present and assisted therein.

Appellant seems, however, to adopt the view that the partnership work was so intermittently done that it ceased when respondent was away, and that appellant then cut logs at

the same place on his own account and not that of the partnership. We think the evidence does not justify the appellant's position. The partnership undertook to cut the timber and there had been no agreed cessation of its work as such. The partnership operations therefore continued although respondent was for a time away from the work. Even if it be true that appellant did the greater amount of work about the firm's business, still no agreement between the partners is shown that one was to receive a greater share of the partnership earnings for his services by reason of the absence of the other. In the absence of such an agreement one partner is not entitled to recover from the other by reason of inequality of services. In *Wisner v. Field*, 11 N. D. 257, 91 N. W. 67, the court said:

"We find no case in which it has been held that a mere inequality of services by partners is alone ground for compensating the one doing the greater part of the work, in the absence of an agreement express or implied."

See, also, *Smith v. Brown*, 44 W. Va. 342, 30 S. E. 160; *Scott v. Boyd*, 101 Va. 28, 42 S. E. 918; *Lamb v. Wilson*, 70 Neb. 729, 97 N. W. 825; *Whitney v. Whitney*, 27 Ky. Law 561, 88 S. W. 311; *Mills v. Fellows*, 30 La. Ann. 824; *Coddington v. Idell*, 29 N. J. Eq. 504; *Major v. Todd*, 84 Mich. 85; *Bennett's Adm'r v. Russell's Adm'r*, 34 Mo. 524.

There are instances where the course of dealing of the partners is such, and also where the services rendered are of such an extraordinary character, that the law implies a contract to pay one partner for extra services, but such facts are not established by the evidence here. The findings are sustained by the evidence in the record, and we see no reason for disturbing them.

The judgment is affirmed.

FULLERTON, RUDKIN, CROW, ROOT, DUNBAR, and MOUNT, JJ., concur.

[No. 6829. Decided November 5, 1907.]

ELOF FERDIG *et al.*, *Respondents*, v. GEORGE SIMPSON, *Appellant*, MONTESANO STATE BANK, *Defendant*.[1]

APPEAL—RECORD—EXCEPTIONS. In the absence of exceptions to the findings, they are conclusive, and the evidence cannot be reviewed.

APPEAL—REVIEW—HARMLESS ERROR—COSTS. Error in twice taxing an attorney's fees as costs cannot be claimed where one fee was promptly remitted on attention being called thereto.

APPEAL — RECORD — EXCEPTIONS — REVIEW — DEPOSIT IN COURT — TENDER. Error cannot be predicated upon the authorization of a withdrawal of defendant's tender and deposit in court to be applied on the judgment against him, because only a conditional tender had been pleaded, where the tender was made at the trial and is not shown to be the tender pleaded, in the absence of exceptions to the findings.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered January 7, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to foreclose mechanics' liens. Affirmed.

J. C. Cross, for appellant.

A. M. Abel, for respondents.

MOUNT, J.—Respondents brought two separate actions in the court below against the same defendants, to foreclose liens for labor performed upon a certain building which was being erected in the town of Elma, in Chehalis county, for the Montesano State Bank, by appellant as contractor. After the actions were begun, they were consolidated by order of the court and tried as one action. The trial resulted in findings and a decree in favor of the plaintiffs in the action.

No exceptions appear to have been taken to the findings.

[1]Reported in 92 Pac. 370.

They must therefore be considered as the facts in the case, and supported by the evidence. *Adams v. Casey*, 39 Wash. 37, 80 Pac. 853. We shall, therefore, not consider any of the questions presented which go to the sufficiency of the evidence to support the findings. It is not contended that the findings made by the court are insufficient to sustain the judgment.

The court found that $25 was a reasonable sum to be allowed for attorney's fees to each of the plaintiffs, and judgment was entered therefor. When the costs were taxed, $25 was inserted therein as costs for attorney's fees. When the attention of the respondents and the trial court was called to this fact, respondents promptly remitted the attorney's fees taxed as costs, and the court made an order striking that item from the cost bill. No error can therefore be predicated upon the fact that the attorney's fees were taxed twice.

At the trial the appellant paid into court as a tender the sum of $58.95, for each plaintiff, The court found that this tender was not made until the day of trial, after all the costs had been incurred, and concluded that the same was therefore insufficient to avoid the payment of costs. After judgment and upon motion of the respondents, the court made an order authorizing the respondents to withdraw this money and apply the same upon the judgment. Appellant now contends that this was error because the tender was a conditional one. It is true the answer pleads a conditional tender, but the tender paid into court at the time of the trial is not shown to be the one pleaded in the answer, and the court did not find that the tender paid was a conditional one. We must presume, in the absence of an exception to the court's finding upon that subject, that the finding is correct and contains all the facts, and that the deposit was therefore unconditional.

There is no reversible error in the record. The judgment must therefore be affirmed.

HADLEY, C. J., CROW, FULLERTON, RUDKIN, DUNBAR, and ROOT, JJ., concur.

[No. 6954. Decided November 5, 1907.]

MYRON DURGA *et al.*, *Respondents*, v. LINCOLN CREEK LUMBER COMPANY, *Appellant*.[1]

ACTIONS—JOINDER OF CAUSES. Under Bal. Code, § 4793, an action may be maintained for both legal and equitable relief.

WATERS—RIPARIAN RIGHTS—REASONABLE USE—LIMITATIONS. The reasonable use of waters by a riparian owner operating a mill does not extend to the flooding of adjacent lands by the maintenance of dams for a water power necessary to run the mill.

SAME—DAMAGES—INJUNCTION—GROUNDS. Where there is natural drainage from plaintiff's lands across the land of an adjoining owner to a creek, the flooding of the adjoining owner's lands so as to flood any part of plaintiff's lands, or so as to cause the water to stand near the surface, or prevent drainage thereof, rendering the land unfit for cultivation, entitles plaintiff to injunctive relief.

SAME—ESTOPPEL. A settlement and acceptance of the damages done in one year by flooding plaintiff's lands does not estop plaintiff from seeking injunctive relief in a following year.

Appeal from a judgment of the superior court for Lewis county, Irwin, J., entered March 6, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for an injunction and damages. Affirmed.

B. H. Rhodes and *W. W. Langhorne*, for appellant.

Reynolds & Stewart, for respondents.

MOUNT, J.—The respondents brought this action to restrain the appellant from maintaining a dam across Lincoln creek in Lewis county, which dam, it is alleged, obstructed the flow of water in the creek, causing same to back upon, overflow, and damage plaintiffs' lands; and also alleged damages on account thereof. Upon a trial of the case, the lower court

[1]Reported in 92 Pac. 343.

granted the relief substantially as prayed for. The defendant has appealed.

The facts, as alleged in the complaint and found by the court, and which appear to us to be established by the evidence, are, in substance, as follows: The appellant is a domestic corporation, engaged in floating logs down Lincoln creek, in Lewis county, to its mill near the mouth of said creek, where it empties into the Chehalis river. Near this point the appellant converts said logs into lumber and manufactured product. Appellant, near its mills, maintains two dams across Lincoln creek. These dams are about thirty rods apart. They raise the water from five to ten feet above the natural surface, and cause the same to be held back for a distance of several miles above the dams, thereby overflowing the lands above. The respondents' lands are above the dams, but do not abut upon the creek banks. One Alberts owns a tract of land from eighty to one hundred and sixty rods wide, lying between respondents' lands and Lincoln creek. Appellant has acquired the right to overflow these lands belonging to Mr. Alberts. A slough extends through the Alberts tract from Lincoln creek, reaching almost to respondents' lands. The overflow upon respondents' lands is caused by back water from the creek which is forced into this slough.

Lincoln creek is the main watercourse and natural drainage for a large extent of country, which extends about twenty miles in length and averages about five miles in width. The lands embraced within this country are known as "bottom lands," and are comparatively level and very fertile. They have but slight elevation above the surface of the water of Lincoln creek. Respondents' lands are a part of these bottom lands, and when not flooded are very productive. The dams of the appellant company, as constructed and maintained for the last two years, have stopped the natural flow of the water in Lincoln creek and caused the same to flow upon a part of respondents' lands, and to percolate through the subsoil of the whole thereof so as to prevent drainage, and have thereby

caused respondents' lands to become wet and unproductive and unfit for cultivation. It was found that the damage caused thereby was $125 for the year 1905, which was agreed upon by the parties and paid for that year, and the damage for the year 1906 was $150. The court further found that the dams unless removed will continue to damage the respondents to an extent that cannot be estimated or compensated in money. At the trial it was agreed that, after the action was begun and just prior to the trial, the appellant had reduced the height of the larger dam from eight feet four inches to three feet four inches, but the court found that, at the point of the larger dam, the creek should be cleared of the whole dam so that the drainage of respondents' lands might reach the creek at its natural level, and entered a decree accordingly.

The appellant argues that the trial court should have sustained a demurrer to the complaint because both legal and equitable relief are prayed for. This does not make the complaint subject to demurrer under our statute, Bal. Code, § 4793 (P. C. § 250).

Appellant also contends, because the dams complained of were erected on its own land and were necessary in the conduct of its logging business, that it is entitled to the reasonable use of the water in Lincoln creek. This proposition as stated may be conceded, but the reasonable use of the creek does not extend to destroying or to materially damaging the property of others. *Bryant v. Lamb Timber Co.*, 37 Wash. 168, 79 Pac. 622, and cases cited. If such use might be held to be a reasonable use, the appellant might extend the height of these dams, as demanded by an increase of its milling business, until the whole country should be entirely and continuously inundated, and the lands abutting upon the creek, and other lands not abutting thereon, might be entirely destroyed. This, of course is not contended for, and cannot be the rule. The reasonable use of the waters of this creek does not extend to

flooding or materially injuring the lands abutting thereon or adjacent thereto.

It is apparently conceded by appellant that the dam which was ordered removed entirely, flooded about one-half an acre of respondents' lands. This of itself was sufficient to base the decree upon. But we also think the evidence fairly shows that a large part of respondents' land was damaged by water which was caused by this dam to stand near the surface without actually overflowing the land, and thus rendered the land unfit for cultivation and incapable of drainage. It is true there is no evidence of any right of respondents to drain their lands artificially upon the lands of Alberts, lying between respondents and the creek. But there is sufficient, we think, to show a natural drainage when the water in the creek is not raised above its natural flow.

Appellant also contends that the respondents are estopped to claim injunctive relief, by reason of the fact that the respondents consented to the damages for the year 1905 in consideration that appellant would pay therefor. It is conceded that respondents complained about the damages which were being done their lands, by means of back water from appellant's dams, in the year 1905, and appellant paid the damages, which were agreed upon at $125. The effect of this agreement was only a settlement of the damages for that year. It did not amount to a license for subsequent years and, even if it did, it was a parol license which could be revoked at any time thereafter. It was subsequently revoked, and of course worked no estoppel upon respondents to claim injunctive relief thereafter.

It is also claimed that when the dam was cut down to three feet four inches, the water thereafter could not overflow respondents' land. But the court found, we think fairly from the evidence, that the back water under the surface of the land, caused by the remaining portion of the dam, was an injury to respondents' lands, which by reason of the dam could not be

drained. This was sufficient to justify the mandatory injunction.

We find no error in the record. The judgment of the lower court is accordingly affirmed.

HADLEY, C. J., CROW, FULLERTON, RUDKIN, DUNBAR, and ROOT, JJ., concur.

[No. 6957. Decided November 5, 1907.]

THE STATE OF WASHINGTON, *on the Relation of William Robert Newman, Respondent*, v. J. F. LIBBY, *Appellant*.[1]

ALIENS—NATURALIZATION—FEES. As the Federal constitution gives Congress power to establish a uniform rule of naturalization, the act of June 29, 1906, fixing the fees to be charged by all clerks of courts exercising jurisdiction in naturalization cases, applies to state courts where the state constitution confers such jurisdiction; and the fee authorized by a state statute cannot be collected.

Appeal from an order of the superior court for Pierce county, Reid, J., entered August 26, 1907, granting a writ of mandate to compel a county clerk to issue a certificate of naturalization, upon tender of the fee provided therefor by an act of Congress. Affirmed.

H. G. Rowland, for appellant.

Lorenzo Dow and *H. R. Lea*, for respondent.

MOUNT, J.—The superior court of Pierce county, on August 26, 1907, made an order, upon proper proof, admitting the respondent to citizenship. Respondent thereupon tendered to the clerk of said court $2, and demanded a certificate of naturalization. The clerk refused this demand, upon the

[1]Reported in 92 Pac. 350.

ground that the fee therefor, as provided by the statute of this state, is $3. Respondent thereupon brought an action in mandamus to require the clerk to issue the certificate as demanded. The clerk demurred to the petition, upon the ground that it did not state facts sufficient. This demurrer was denied and, the clerk electing to stand upon the demurrer, a peremptory order was issued, from which this appeal is prosecuted.

The only question in the case is whether clerks of the superior courts of this state must enter a final admission of aliens to the rights of citizenship and give a certified copy thereof upon payment of a fee of $2, as fixed by the act of Congress of June 29, 1906, chapter 3592 of the Federal Statutes; or may they demand $3 as specified by the law of this state. The statutes of this state provide for a fee of $3 "for entering the final admission of an alien to citizenship, and for a certified copy thereof under seal." Laws of 1907, page 90. The laws of the United States provide:

"That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding: . . . for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, $2. The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization" . . . Act of June 29, 1906, establishing a Bureau of Immigration and Naturalization, Fed. Stats., chap. 3592, § 13.

Section 21 of the same act provides:

"That it shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings, to demand, charge, collect or receive any other or additional fees or moneys in naturalization proceedings, save the fees and moneys herein specified; and a

violation of any of the provisions of this section or any part thereof is hereby declared to be a misdemeanor,"

punishable by fine or imprisonment or both. Congress has power under the constitution of the United States to establish a uniform rule of naturalization throughout the United States. Fed. Stats., Art. 1, § 8.

Judge Story, in his Commentaries on the Constitution, Vol. 2, §1104, says:

"It follows, from the very nature of the power, that, to be useful, it must be exclusive; for a concurrent power in the states would bring back all the evils and embarrassments which the uniform rule of the constitution was designed to remedy. And, accordingly, though there was a momentary hesitation, when the constitution first went into operation, whether the power might not still be exercised by the states, subject only to the control of Congress, so far as the legislation of the latter extended, as the supreme law, yet the power is now firmly established to be exclusive. The Federalist, indeed, introduced this very case, as entirely clear, to illustrate the doctrine of exclusive power by implication, arising from the repugnancy of a similar power in the states. 'This power must necessarily be exclusive,' says the authors, 'because, if each state had power to prescribe a distinct rule, there could be no uniform rule.' "

See, also, 1 Kent's Commentaries, page 424, to the same effect.

It follows that Congress acted within its power when it passed the act of 1906, which provides for a uniform rule for the naturalization of aliens throughout the United States. The provisions respecting fees are as much a part of the uniform rules as other provisions of the act. The question whether Congress may require state courts to exercise Federal jurisdiction may be a debatable question, and it may be settled that the Federal government cannot impose burdens upon procedure generally. But these questions are not before us in this case, because when it is determined or conceded that Congress has exclusive authority to establish uniform rules of naturalization throughout the United States and has exer-

cised that power, such rules are binding upon the state and state courts. To hold otherwise is to deny Congress a power expressly given by the Federal constitution.

The constitution of this state, at § 6, art. 4, expressly confers the power of naturalization upon superior courts. This provision was placed in our constitution in harmony with the United States Statutes then in force, authorizing state courts to naturalize aliens, and in effect expressed the consent of the state to exercise that duty in conformity with Federal law. It was not intended, and has never been supposed, to be in conflict with the Federal constitution, or to reserve to the state a power which was already vested in the United States.

We conclude, therefore, that the fees fixed by Congress control in naturalization proceedings to the exclusion of state legislation upon that subject. The judgment of the lower court must therefore be affirmed.

HADLEY, C. J., CROW, FULLERTON, RUDKIN, DUNBAR, and ROOT, JJ., concur.

[No. 6877. Decided November 5, 1907.]

WILLIAM ADAMS, *a Minor, by His Guardian etc., Respondent*, v. PETERMAN MANUFACTURING COMPANY, *Appellant*.[1]

APPEAL—REVIEW—WAIVER OF ERROR—TRIAL. Error in refusing to grant a nonsuit is waived by proceeding with the trial.

TRIAL—DIRECTION OF VERDICT—JUDGMENT NOTWITHSTANDING VERDICT. Insufficiency of the evidence may be urged after waiver of a nonsuit, by a motion to direct a verdict, or for judgment notwithstanding the verdict.

MASTER AND SERVANT — INJURIES — GUARDING MACHINERY — QUESTIONS FOR JURY. Where there was competent testimony that cutter heads in a grooving machine could have been practically and efficiently guarded, under the factory act, the questions of credibility of the evidence, and whether they should have been guarded, are for the jury.

[1]Reported in 92 Pac. 339.

SAME—EVIDENCE—RELEVANCY—STATEMENTS OF THIRD PERSONS—INTENTIONS OF MASTER. Evidence of discussions between the appellant's foreman and a deputy factory inspector as to the propriety of guarding machinery, and of the master's future intentions, is inadmissible upon an issue as to whether a guard was necessary.

DAMAGES — PERSONAL INJURIES — EXCESSIVENESS. A verdict in favor of a minor for $1,119.25 for damages for tearing off one finger and lacerating the thumb and second finger is not excessive.

Appeal from a judgment of the superior court for Pierce county, Black, J., entered January 30, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor employed in operating a sash sticker. Affirmed.

R. S. Eskridge and *Philip Tindall*, for appellant.

G. P. Fishburne and *Ellis & Fletcher*, for respondent.

RUDKIN, J.—On the 17th day of May, 1906, the plaintiff, who is a minor, was in the employ of the defendant and was engaged in plowing grooves in sash stiles, about eighteen inches in length, on a machine known as a sash sticker. This machine consisted of a slightly inclined table, about eight inches wide and two and one-half feet long, having a slot about four and one-half inches in length through which the revolving cutter-heads projected. The cutter-heads, two in number, were chisel-like devices, revolving on a shaft, by which a groove about one-half inch wide and one-half inch deep was plowed or cut in the sash. In operating the machine the operator stood at one side of the table, placed the stile against a gauge about seven and one-half inches in length alongside of the slot through which the knives projected, and pushed the stile along until it struck a lug projecting from the table. The operator would then press a lever with his foot, causing a revolving bit to spring up and bore a hole in the stile about two inches beyond the end of that portion which had been cut or plowed. As soon as the hole was bored,

the bit and lug would drop automatically and permit the stile to be pushed forward to a second lug which would stop the stile as soon as the remainder of the groove was cut as far as the bit hole. In plowing the stiles one of them in some manner got beyond the control of the plaintiff as he pushed it over the machine, and was kicked back by the cutter-heads upon which his hand fell, causing the injury complained of.

The complaint contained two causes of action: The first, under the factory act for failure to guard the cutter-heads; the second, a common law action for negligence based upon the allegations that the plaintiff was a minor and was not given proper instruction as to the dangers incident to the operation of the machinery; that the gauge above referred to was too short; that the screw fastening the gauge was defective, and that the knives in the cutter-heads were dull. The plaintiff had judgment in the sum of $1,119.25, and the defendant appeals.

The errors assigned in the original brief are, the refusal of the court to grant a nonsuit, the refusal of the court to direct a judgment in favor of the appellant at the close of all the evidence, the refusal to direct a judgment for the appellant notwithstanding the verdict, the rejection of certain testimony offered by the appellant, and the refusal of a new trial. Any error in the refusal to grant a nonsuit was waived by proceeding with the trial after the motion for nonsuit was denied, but the same question is presented by the motion to direct a verdict and for judgment notwithstanding the verdict. There was unquestionably competent testimony tending to show that the cutter-heads in question could have been guarded practically and effectively, with due regard to the ordinary use of the machine, and that the accident complained of would not have occurred had such guard been in use. Whether this testimony was credible, and whether the guard was practical and efficient, presented questions of fact for the consideration of the jury, and their verdict is binding on this

court. *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 3; *Rector v. Bryant Lumber etc. Co.*, 41 Wash. 556, 84 Pac. 7; *Vosberg v. Michigan Lumber Co.*, 45 Wash. 670, 89 Pac. 168; *Campbell v. Wheelihan-Weidauer Co.*, 45 Wash. 675, 89 Pac. 161.

The several motions based on the insufficiency of the testimony to sustain the verdict were properly denied. The evidence rejected consisted of discussions between the appellant's foreman and the deputy factory inspector as to the necessity and propriety of guarding the machine, and as to the future intentions of the appellant in relation to such a guard. Such testimony was clearly incompetent and was properly rejected. In a supplemental brief numerous errors are assigned in the giving and refusing of instructions. The instructions were somewhat involved, by reason of the union of the statutory action and the common law action in the same complaint, but when the charge of the court is taken as a whole we think it was as favorable to the appellant as the law would warrant.

The only new question presented by the motion for a new trial is that the verdict is excessive. It cannot be said as a matter of law that a verdict in the amount returned by the jury for literally tearing off one finger and lacerating the thumb and a second finger is excessive, or is the result of passion or prejudice on the part of the jury.

Finding no error in the record the judgment is affirmed.

HADLEY, C. J., FULLERTON, CROW, MOUNT, ROOT, and DUNBAR, JJ., concur.

[No. 6993. Decided November 5, 1907.]

ELLEN MONRO *et al.*, *Appellants*, v. NATIONAL SURETY COMPANY, *Respondent*, A. ABRAHAMSON *et al.*, *Defendants*.[1]

CONTRACTS — CONSIDERATION — EFFECT OF SEAL — BONDS. In an action upon an indemnity bond under seal, a nonsuit cannot be sustained for mere failure to prove a consideration, since the seal imports a consideration notwithstanding Bal. Code, § 4523, abolishing the use of private seals.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—PREMATURE PAYMENTS. Premature payments or advances, of a part of installments falling due to a contractor, do not discharge a bonding company which was surety on the building bond, where the contractor shortly became entitled to the payments, which were then deducted from the amounts due him, and the payments could not have operated to the prejudice of the bonding company.

SAME—NOTICE OF DEFAULT—DELAY IN GIVING—EFFECT. Where a building was to be completed September 15, and the first notice of default to the surety company was given November 22, the delay in giving notice releases the surety only as to claims for demurrage or failure to complete the building on time, and not as to damages arising from lien claims.

SAME—TIME FOR BRINGING ACTION—LIMITATIONS. Where an indemnity bond required action to be brought within six months after the time fixed in the contract for the completion of the work, which was September 15, 1905, an action commenced March 12, 1906, is within time.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 15, 1907, granting a nonsuit at the close of plaintiff's case, in an action on an indemnity bond. Reversed.

Revelle, Revelle & Revelle, for appellants.

Graves, Palmer & Murphy (*C. H. Winders*, of counsel), for respondent.

[1]Reported in 92 Pac. 280.

RUDKIN, J.—This was an action on an indemnity bond, against the contractor and the bonding company, to recover damages for failure to perform a building contract. At the close of the plaintiffs' case a judgment of nonsuit was granted as to the bonding company, and the cause proceeded to verdict and judgment against the contractor. The present appeal is from the judgment of nonsuit.

The questions involved have been discussed by counsel under the following heads: (1) Was a consideration for the indemnity bond shown? (2) Was there a failure to perform the conditions of the building contract or bond on the part of the appellants? (3) Was the bonding company duly notified of the failure of the contractor to perform his contract? (4) Was such notice waived? and (5) The statute of limitations.

(1) The bond under consideration is in all respects similar to the bond in suit in *Considine v. Gallagher*, 31 Wash. 669, 72 Pac. 469. It was there held that the bond was an instrument under seal, and that the common law rule that a seal imports a consideration still obtains in this state, notwithstanding the statute abolishing the use of private seals. Bal. Code, §4523 (P. C., §4438). Counsel for respondent contend, however, that the question there arose on the pleadings, and that a different rule should apply here. True, the question arose on the pleadings in the *Considine* case, but the common rule that a seal imports a consideration is a positive rule of law, and not a mere rule of procedure. Thus, in *Storm v. United States*, 94 U. S. 76, 24 L. Ed. 42, the court said:

"Such a defence could not be sustained, even if the action was upon a simple contract; but the agreement here is under seal, and the action is an action of debt founded on the bond given to secure the performance of the agreement; and it is an elementary rule, that a bond or other specialty is presumed to have been made upon good consideration, so long as the instrument remains unimpeached. Taylor, Evid. (6th ed.) 103; *Lowe v. Peers*, 4 Burr. 2225; *Dorr v. Munsell*, 13 Johns. 431.

"Want of consideration is not a sufficient answer to an action on a sealed instrument. The seal imports a consideration, or renders proof of consideration unnecessary; because the instrument binds the parties by force of the natural presumption that an instrument executed with so much deliberation and solemnity is founded upon some sufficient cause. *Parker v. Parmele*, 20 Johns. 134; 1 Smith, Lead. Cas. (7th Am. ed.), 698;1 Chitty on Contr. (11th Am. ed.) 20; *Paige v. Parker*, 8 Gray 213; *Wing v. Chase*, 35 Me. 265; 2 Bl. Com. 446; *Fallowes v. Taylor*, 7 Term. 473.".

We are therefore of opinion that the nonsuit cannot be sustained for mere failure to prove a consideration for the indemnity bond.

(2) In support of the second proposition, it is contended, among other things, that the appellants paid over money to the contractor before it became due or payable under the terms of the contract. The contract price was payable in installments on certificates to be furnished by the architect in charge. One thousand dollars was payable when the foundation was completed, including the first floor; $1,000 when the framework was up and the shiplap on; $1,000 when the roof was on; $1,000 when the plastering was browned out; $1,500 when the stores were finished; $1,000 when the brick and outside work was finished, and the balance of $1,600 when the entire work was completed. The second installment of $1,000 was certified by the architect under date of August 12, but on the 27th day of July preceding, the appellants loaned the contractor $200 on his note, and two days later paid him an additional $150, which sums were deducted from the amount of the estimate when made, and the balance of $650 was paid when the certificate was presented. The fourth estimate of $1,000 was certified on September 15th, but on the 12th day of September preceding the contractor was paid $823.50, the amount being deducted from the estimate when made, and the balance of $176.50 was paid when the certificate was presented. What disposition was made of the sums thus advanced does not appear. The owner of the building was

under no obligation to see to the application of the installments paid under the contract, and we fail to see wherein the bonding company was prejudiced or injured in this regard. *Leghorn v. Nydell*, 39 Wash. 17, 80 Pac. 833. Had the contractor never become entitled to the sums thus advanced, a different question would be presented, but in no event could the premature payments constitute a defense beyond the amount of the advancements made, and not at all unless the payments operated to the prejudice of the bonding company. We are unable to discover any other default on the part of the property owner, unless it be in the matter of serving notice of the contractor's default, which we will discuss under the next head.

(3) This court has repeatedly held that a failure to give notice in this class of cases is only a defense in so far as the surety has been damaged or prejudiced by such failure. *Heffernan v. United States Fidelity etc. Co.*, 37 Wash. 477, 79 Pac. 1095; *Trinity Parish v. Aetna Indemnity Co.*, 37 Wash. 515, 79 Pac. 1097; *Denny v. Spurr*, 38 Wash. 347, 80 Pac. 541. In the case at bar the contract was to be completed on or before September 15th, and the first notice of default was given November 22d. Failure to give notice at an earlier date would release the bonding company from any claim for demurrage or for failure to complete the building on time, but not for damages arising from lien claims for labor or material. Cases above cited.

(4) In view of our conclusion that the bonding company was not released by failure to give notice we need not discuss the question of waiver.

(5) The bond in suit provides that "No action, suit or proceedings shall be had or maintained against the company on this instrument unless same be brought or instituted and process served upon the company therein within six months after the date or time fixed in said contract for the completion of the work mentioned therein." As we have seen, work

was to be completed under the contract on or before September 15, 1905, and the present action was commenced on the 12th day of March, 1906, by the service of summons and complaint on the bonding company, as appears from the supplemental transcript. The action was therefore commenced within the time limited by the contract.

The nonsuit cannot be sustained on any of the grounds suggested, and the judgment is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

FULLERTON, MOUNT, and DUNBAR, JJ., concur.

HADLEY, C. J. and ROOT, J., took no part.

[No. 6924. Decided November 5, 1907.]

OLAF J. JOHNSON, *by His Guardian etc., Respondent*, v. FAR WEST LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURIES—GUARDING MACHINERY—FACTORY ACT. A master cannot escape liability from failing to guard dangerous machinery from the fact that a proper safeguard had been provided but was temporarily removed, where it was not the plaintiff's duty to see that the same was adjusted.

SAME—UNGUARDED MACHINES—ASSUMPTION OF RISK. An employee does not assume the risk from the failure of the master to guard machinery as required by the factory act.

SAME — UNGUARDED MACHINES — CONTRIBUTORY NEGLIGENCE. An employee who works about machinery after having notice that it is not guarded as required by the factory act, the risk of which condition he does not assume, is not thereby guilty of contributory negligence, nor precluded from a recovery unless the injury is caused by a negligent act of his own, and not alone by the dangers of his situation.

SAME. An operator of a sticker who, in reaching up for a strap, raises his foot, so that it comes in contact with an unguarded saw under the table, is not thereby guilty of contributory negligence, as a matter of law.

[1]Reported in 92 Pac. 274.

SAME—VERDICT IN FAVOR OF COEMPLOYEE AS DISCHARGE OF MASTER. Where a master and his superintendent are jointly sued for negligence in failing to guard dangerous machinery as required by the factory act, a separate verdict in favor of the superintendent does not discharge the master or preclude a verdict against him, since the statute imposes the imperative duty upon the master and not upon the superintendent.

Appeal from a judgment of the superior court for Pierce county, Rice, J., entered April 11, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor employed in a planing mill. Affirmed.

Shackleford & Hayden, for appellant.

R. G. Hoge, for respondent.

DUNBAR, J.—This action was brought by the respondent, a sixteen-year old boy, through his guardian *ad litem*, to recover for injuries received in the planing mill of the Far West Lumber Company, a corporation. One Voegtle was a superintendent of the mill, and the complaint alleges negligence on the part of the lumber company and of Voegtle, by causing a certain resaw, one of the machines being operated in the mill, to be put to work, when it was known that the said machine was in a dangerous condition, unprotected, unguarded, and unboxed. The sticker or planer machine and resaw were side by side in the mill. On the night of the accident the respondent's work was to operate the resaw. During the night he and the man operating the sticker, temporarily and of their own accord, changed places for a few minutes. This fact is not material to the discussion of the case, as it appears from the testimony that this exchange was frequently made by permission of the foreman, one Ellison, and often at his command. While operating the sticker the respondent had occasion to use the chip breaker. The chip breaker was operated by a strap which hung on the side of the machine, about opposite the resaw, and the chip breaker was operated by

pulling this strap. The respondent pulled on the strap of the chip breaker, and while he was doing this, raised his right foot so that his heel came in contact with the resaw, or that part of it which projected under the table, and caused the injury.

Prior to the accident the mill had been inspected, and the certificate which the law provides should be prima facie evidence that the machine was properly guarded had been issued. The resaw at this time was not guarded, the guard having been removed, presumably because the chutes which carried off the sawdust were stopped up. At the conclusion of the plaintiff's testimony and the submission of the case to the jury, verdict was rendered in favor of Voegtle, the superintendent, and against the Far West Lumber Company, the appellant.

No particular assignments of error are made by appellant, except that the court erred in overruling appellant's motion for a new trial; but it is contended generally, (1) that the respondent was guilty of contributory negligence; (2) that inasmuch as the jury found in favor of defendant Voegtle, under the rule announced by this court in *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, the lumber company could not be held responsible. On the first proposition it is contended that this is a case where the employer had provided the proper safeguard, and that inasmuch as it was the duty of the plaintiff to adjust such safeguard, and he failed to do so, he cannot hold the employer responsible for the lack of the safeguard, and it was therefore his own negligence in this respect which was the cause of the accident. But inasmuch as the evidence in no way tends to show that it was the respondent's duty to adjust the hood which protected the saw on which he was injured, the contention seems to be without force.

It is also contended that, even if it were not the respondent's duty to adjust the guard, inasmuch as he did not report the dangerous condition to his employer, he cannot recover. This

contention must necessarily be based upon the assumption that he assumed the risk of the unguarded machinery. But this contention was passed on by this court in *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915. In that case the respondent admitted that he knew, for some time prior to his injury, of the unguarded machinery, and knew that it was dangerous; and we held in that case, after a thorough investigation of the authorities, that the defense of assumption of risk was not available to the employer under such circumstances, for the reason that it had not guarded the machinery as it was required to do by the mandate of the statute. The kindred contention that the employee was guilty of contributory negligence was also disposed of in that case in the following language:

"The appellant next contends that the court erred in refusing to rule, as a matter of law, that the respondent was guilty of contributory negligence. All that the evidence shows on this question is that the respondent continued in his work after he had knowledge of the fact that the collar and set screw which caused his injury were uncovered. But it will hardly do to say that an employee is guilty of contributory negligence for merely working in a dangerous place when he does not assume the risk of injury for working therein. It is true that in such cases contributory negligence and assumption of risk approximate, and it is difficult to draw a line between them, but we think that, to convict an employee of contributory negligence for working in a place where he does not assume the risk of injury, it must be shown that he did not use care reasonably commensurate with the risk to avoid injurious consequences; in other words, that it was some negligent act of his own that caused his injury, and not alone the dangers of his situation."

This case followed a prior case decided by this court, viz., *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310. The doctrine of these two cases has since been reaffirmed so often that it may be considered settled.

There seems to us to be no merit in the appellant's contention that respondent was guilty of contributory negligence

by raising his foot in such a manner that it came in contact with the saw. The evident object of the legislation was to provide against unforseen accidents. Besides, this was a question which was submitted to the jury. On the second proposition, we think the case of *Doremus v. Root, supra*, is not parallel. In addition to the fact that negligence was alleged not only against the superintendent Voegtle, but also in some degree against the foreman Ellison, the duty of the appellant to protect this machinery is imperative. It was made its duty by a special statute, while it was not the duty of the superintendent; at least, he owed no duty to the respondent, whatever may have been his obligations to his employer.

In the *Doremus* case the respondent in his complaint alleged that Root, the conductor, by virtue of his employment, had the charge and control of all trains on which he was employed as conductor, and of all persons employed thereon, and he was responsible for their movements while on the road. It then set forth the negligence and careless acts of Root, and concluded with the following allegations, viz.: "That by reason of the carelessness, negligence, and recklessness of the said Samuel Root, the injuries suffered by the said plaintiff were received." Under such allegations it was plain that the only possible theory upon which the railroad company could be held guilty of negligence would be its responsibility for the negligence of the conductor who was the only actor in the transaction; and when the verdict as construed by the court was in favor of Root, it would have been manifest injustice to have held the company guilty of negligence. But not so in this case, where the guarding of the machinery was an imperative duty and a work which might have been performed by any agent or servant of the company.

No other questions being involved, and no error appearing in the record, the judgment is affirmed.

RUDKIN, FULLERTON, and MOUNT, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 6893. Decided November 6, 1907.]

JOHN B. MEY, *Appellant*, v. SEATTLE ELECTRIC COMPANY, *Respondent*.[1]

STREET RAILROADS—INJURY TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A pedestrian is guilty of contributory negligence, precluding a recovery, in walking on a street car track in a city where cars were constantly passing, at a point where the sidewalk and part of the street was fenced off or taken up with building operations, where there was room, every few feet, for him to get off the track to allow a car to pass and he failed to keep on the lookout for cars coming up behind.

SAME—NEGLIGENCE OF MOTORMAN—EVIDENCE—SUFFICIENCY. In such a case, a motorman has the right to assume that the man would step off the track upon the approach of a car, and the company is not shown to be guilty of negligence by reason of running down the plaintiff, where the car was running at ordinary speed, and there was no proof that ordinary precautions were not taken.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 24, 1907, upon sustaining a motion for nonsuit at the close of plaintiff's testimony, dismissing an action for personal injuries sustained by a pedestrian through being struck by a street car. Affirmed.

Brightman & Tennant, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

DUNBAR, J.—The plaintiff and appellant is a farmer who lives in Kitsap county, Washington, across Puget Sound to the west of Seattle. Having occasion to come to Seattle on the 14th day of September, 1906, he landed from a steamboat at the Galbraith wharf, located a little to the west of the foot of Madison street, in the city of Seattle. Desiring to visit Schwabacher's hardware store, which is on the west side of First avenue, he proceeded from the wharf where he landed

[1]Reported in 92 Pac. 283.

east, on the north side of Madison street, to the intersection of Madison street and First avenue, this intersection being at right angles. M. Seller & Co. at that time were having a retaining wall built around their building on the south side of Madison street and on the west side of First avenue. The sidewalk where this work was going on was fenced off, so that passengers must go through an opening to get on to the sidewalk, or out into the street. Along the west side of First avenue, between the west rail of the west track of defendant's street railway and the curb, the street was occupied by sand, gravel, form boxes, etc., excepting a space next to the rail in places from two and one-half to three feet wide. The appellant turned south on First avenue and turned out into the street, walking along between the west rail of the defendant's car line and a pile of debris, and while walking along near this debris, or, as it seems to us from the testimony, just south of it, one of the defendant's cars, coming from the north and going in the same direction in which the plaintiff was going, ran against him, knocking him down, and causing the injuries complained of.

At the close of plaintiff's testimony the court sustained defendant's motion for a nonsuit, upon the ground (1) that he had failed to show negligence on the part of the defendant, and (2) that it appeared from the plaintiff's case that he was guilty of contributory negligence. Judgment was entered in favor of defendant, and from this judgment this appeal is taken.

We think the court did not commit error in sustaining this motion. While this court, in common with all other courts, has held that the right to use the street was a joint right with the ordinary traveler, whether equestrian or pedestrian, yet it has always recognized the patent fact that the cars traveling on fixed tracks must of necessity be accorded the right of way under ordinary circumstances. If this were not true the management and running of street cars in a city would be rendered impracticable if not impossible. In this case the

testimony of the plaintiff is somewhat indefinite. He did not seem to know very much about the distance that he traveled or where he was hurt. But the testimony of his supporting witnesses, especially that of Mr. McDonald, who was acting as a policeman at the time and who saw the accident and helped to pick up the appellant, was that there was an opening onto the sidewalk along the west side of First avenue, which, if the plaintiff had availed himself of it, would have protected him from any danger from the cars. It also appears from uncontradicted testimony that there was a passage, a portion of the way between the fencing which inclosed the sidewalk and the car line and where the debris was piled, that was wide enough to allow pedestrians to pursue their way and the street cars to pass without injuring them, and that a portion of the way there was not room; and that also at the point where the plaintiff was injured there was room between a carriage or hotel bus and the railroad track for a man to pass without being injured. This being true, it seems plain that it was the duty of the appellant, while traveling in close proximity to this track in a place where he testifies he knew that cars were passing at short intervals, to have exercised the ordinary caution of noticing, when he passed those points where there was not room for both man and car, whether there was any car which was liable to injure him. According to the testimony, the track was on an open, paved street where the slightest observation would have discovered the approach of a car. Not having exercised this ordinary caution, we think the plaintiff was undoubtedly guilty of contributory negligence.

Neither does it appear from the testimony that there was any negligence on the part of the motorman of the car. There is no proof that the car was running beyond its legitimate and ordinary speed. There is no proof that bells were not rung at the crossing, or that the ordinary precautions were not taken. There being room for the passenger to step out of danger every few steps all along the route which he

traveled, the motorman we think might well be justified in concluding that a pedestrian would step out of the way of the car instead of remaining on the track or so close to the track that he would be run down by it. This case we think falls squarely under the rule heretofore announced by this court in *Duteau v. Seattle Electric Co.*, 45 Wash. 418, 88 Pac. 755; *Coats v. Seattle Electric Co.*, 39 Wash. 386, 81 Pac. 830; *Criss v. Seattle Electric Co.*, 38 Wash. 320, 80 Pac. 525, and *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488.

The judgment is affirmed.

ROOT, MOUNT, RUDKIN, and FULLERTON, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 7045. Decided November 6, 1907.]

CHARLES A. RUSSELL, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

CARRIERS — INJURY TO PASSENGER — PLEADING — INSTRUCTIONS. Where the complaint only alleges negligence of a carrier in causing a collision of two of its street cars in the most general terms, the defendant is not entitled to an instruction that the plaintiff's proof must be confined to the specific allegations of the complaint.

SAME—PRESUMPTIONS—BURDEN OF PROOF. Where a carrier admits a collision of two of its street cars, negligence is presumed, and the burden of proof is upon the defendant to show some other cause.

DAMAGES—PERSONAL INJURIES—EXCESSIVENESS. A verdict upon conflicting evidence for $500 for injuries to an ankle, sustained in jumping from a street car about to collide with another, will not be held excessive, when the court is not justified in disturbing the verdict.

[1]Reported in 92 Pac. 288.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 19, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger through a street car collision. Affirmed.

Sachs & Hale, for appellant.

Jackson Silbaugh and *W. R. Bell*, for respondent.

Crow, J.—Action by Charles A. Russell against Seattle, Renton & Southern Railway Company, a corporation, to recover damages for personal injuries. The plaintiff alleged that on August 5, 1906, while he was a passenger for hire on one of defendant's cars, traveling from Seattle to Renton, the defendant, its agents and servants, so carelessly operated said car and other cars on its railway that, when the car on which plaintiff was riding had proceeded to Atlantic City, it was run into and struck by another car coming from the opposite direction on the same track, causing a collision; that just before the actual collision and to save himself from impending danger, the plaintiff jumped from the car on which he was riding, and that in so doing he sustained injuries to his right ankle. The defendant admitted the collision, but denied other allegations of the complaint. From a judgment for $500 entered on the verdict of a jury, the defendant has appealed.

Appellant admits the rule of law to be that when a collision occurs between two of its cars, the happening of such collision raises a presumption of negligence on its part which it will be necessary for appellant to overcome to avoid liability for injuries received by one of its passengers as the result of such collision. Relying, however, upon the allegations of the complaint, the appellant, in support of its principal assignment of error, contends that, having alleged the collision was the result of particular and specific acts of negligence,

the respondent cannot be permitted to recover on account of other acts of negligence not pleaded. We do not find it necessary to determine the effect of an allegation of specific acts of negligence by a plaintiff in a case of this character. As we construe the complaint, it only contains most general allegations of negligence. This being true, the appellant was not entitled to insist, as it did, that the court should instruct the jury to the effect that, in presenting his evidence and establishing his right to recover, the respondent should be strictly confined to the specific acts of negligence pleaded. The entire substance of the allegations of respondent's complaint was that the defendant, its servants and agents, so negligently operated its cars, in one of which he was a passenger, as to cause a collision, causing his injuries. We fail to see how the respondent could say much less in pleading the fact of the collision. It is conceded that the collision being shown, the doctrine of *res ipse loquitur* must apply on behalf of an injured passenger, and that the burden devolved upon the appellant to show by affirmative evidence that the collision was not caused by any negligence upon its part. Having carefully read all the evidence, we conclude there has been an absolute failure upon the part of the appellant to clear itself of negligence or to sustain the burden of proof thus imposed upon it.

As the appellant admitted the collision and failed to show its cause, we hold that, under the pleadings and evidence, the only remaining issue to be determined in this case was the amount of damages to which the respondent, if injured, was entitled. There is evidence tending to show that he was injured. The appellant contends that the amount of recovery is excessive, but we do not feel that, under all the evidence—which was conflicting, we would be justified in interfering with the verdict of the jury. We have carefully examined the entire record and have considered all the assignments of error presented, but are unable to find that any

prejudicial error has been committed by the honorable trial court.

The judgment is affirmed.

HADLEY, C. J., DUNBAR, RUDKIN, and FULLERTON, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 6826. Decided November 6, 1907.]

LAWRENCE V. JORDAN, *a Minor, by His Guardian etc. Respondent*, v. SEATTLE RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

CARRIERS—INJURIES TO PASSENGERS—DEGREE OF CARE—INSTRUCTIONS. It is proper to instruct that a street railway company, operating by electricity in the carriage of passengers, must use "the highest degree of care, skill, and diligence practicable, consistent with the operation" and it is liable for "the slightest negligence in said operation," as the latter is but a corollary of the former.

SAME—PLEADING—PRESUMPTIONS. Where a complaint alleges negligence in general terms in the operation of street cars, which collided, without specifying any particular act, the presumption of negligence arises from the fact of the collision, and is not waived by the general form of the allegation.

DAMAGES—PERSONAL INJURIES—EXCESSIVENESS. A verdict for $500 cannot be said to be influenced by passion or prejudice, where a passenger in a street car collision was knocked down and rendered unconscious, received a cut in the hand, sprained wrist, and bruised leg and knee, and was confined to his home for some considerable time.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 2, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in a street car collision. Affirmed.

Sachs & Hale, for appellant.

Jackson Silbaugh, for respondent.

[1]Reported in 92 Pac. 284.

RUDKIN, J.—The defendant company owns and operates a line of electric railway between the city of Seattle and the town of Renton. On the 13th day of August, 1906, the plaintiff became a passenger on one of the defendant's cars, and while such passenger was injured in a collision between the car upon which he was a passenger and a "line car," operated by the defendant company and running in the opposite direction over the same track. This action was brought to recover damages for the injury so received, and from a judgment in the sum of $500 in favor of the plaintiff, the defendant has appealed.

The first two errors assigned relate to the giving and refusing of instructions defining the degree of care which the law imposes on common carriers of passengers, and will be considered together. The instruction refused was as follows:

"With respect to the degree of care owed by the defendant to its passengers, you are instructed that the duty enjoined by the law upon the defendant's conductors and motormen does not require the exercise of the highest degree of care possible to avoid an accident, but only the highest degree of care reasonably practicable under the circumstances and conditions existing at the time and place in question. By the term 'highest degree of care,' used in these instructions, is meant that degree of care which would be exercised under like circumstances by careful, prudent and experienced conductors and motormen generally."

And the following was the instruction given:

"The jury are instructed that the defendant, at the time of the alleged accident, was the owner of and was operating an electric railway for the purpose of transporting passengers for hire, and was bound to exercise the highest degree of care, skill and diligence practicable consistent with the operation of said electric railway, and the cars used in the operation thereof, and taking into consideration the circumstances and conditions existing at the time and place in question, in order to prevent and avoid injury to the plaintiff, if you find plaintiff was a passenger on the car of said company, as alleged in his amended complaint, and the defendant is

liable for the slightest negligence in said operation; and I further instruct you that the negligence of the agents, servants and employes in charge of the operation of the cars on the electric road of defendant, is, in law, the negligence of the defendant, for which the defendant would be, and is, liable."

The instruction requested by the appellant and refused by the court is in substance the instruction approved by this court in *Foster v. Seattle Electric Co.*, 35 Wash. 177, 76 Pac. 995, and embodies a correct statement of the law. But the instruction given by the court is in our opinion equally free from objection. The statement that the appellant "was bound to exercise the highest degree of care, skill and diligence practicable, consistent with the operation of said electric railway and the cars used in the operation thereof," is certainly free from error, and the further statement that the appellant "is liable for the slightest negligence in said operation," is but a corollary of the rule already announced, or at least was evidently so intended by the court.

"The definitions and explanations given by the various courts, and sometimes by the same court, of the degree of care to be required of carriers, are many and perplexing—in some cases irreconcilable. Reduced to the simplest form, the rule may be stated to be that the carrier is bound to exercise the strictest vigilance in receiving a passenger, conveying him to his destination, and setting him down safely, that the means of conveyance employed and the circumstances of the case will permit." 5 Am. & Eng. Ency. Law (2d ed.), p. 558.

In *Baltimore & Ohio R. Co. v. Noell's Adm'r.*, 32 Gratt. 394, the following instruction was approved:

"The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every inputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or de-

fault in such cases makes such carriers liable in damages under the statute."

In *Philadelphia etc. R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 510, Mr. Justice Grier said:

"When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.' "

We perceive no difference in this regard between the agency of steam and electricity, and the instruction given covered all the substantial features of the instruction refused.

The third error assigned is in the refusal of the court to grant a new trial, under which assignment the following questions are discussed: Insufficiency of the evidence to justify the verdict; that the verdict is against law; error in law occurring at the trial and excepted to at the time, and excessive damages appearing to have been given under the influence of passion and prejudice. The contention that the evidence is insufficient to justify the verdict is based upon the claim that the evidence failed to establish the specific grounds of negligence charged in the complaint. The appellant concedes the general rule of law to be "that ordinarily when a collision occurs between two of the cars of a railway company the happening of such collision raises a presumption of negligence on the part of the railway company, which it is necessary for it to overcome in order to escape liability for injury sustained in such collision;" but counsel contend that where a plaintiff does not rely upon this general presumption but charges specific acts of negligence as a ground for recovery, he cannot recover on grounds not alleged. In support of this contention the case of *Hamilton v. Metropolitan St. R. Co.*, 114 Mo. App. 504, 89 S. W. 893, is cited. That was

an action brought against a street railway company and a steam road to recover damages for injury resulting from a collision between a street car and a freight train. Quoting from the opinion:

"The street railway company is alleged to have 'carelessly and negligently operated and conducted said car across the tracks . . . without then and there having a watchman, and without keeping a necessary and reasonable lookout, and . . . failing to observe the approach of the freight car, and . . . failed to notify the agents and servants of its co-defendant of its approach,' etc. And the defendant railroad company is alleged, in substance, to have negligently failed in these particulars: To maintain a watchman, and to warn the street car company of the approach of the freight car; to place a light on the front end of the freight car, or to give warning by flagman or lookout; and that without warning it ran this freight car, in the nighttime, at a rapid rate of speed, across the tracks of the street car company."

Under these pleadings the court held that it was incumbent on the plaintiff to prove some one or more of the specific acts of negligence charged. Without approving or disapproving the rule announced in that case, we deem it sufficient to say that it has no application here. The complaint in this action alleged negligence in general terms. It charged that:

"The defendant, its agents and servants so carelessly and negligently run and operated said car, and so negligently and carelessly run and operated other cars on its railway that when the car on which the plaintiff was a passenger had proceeded to about Second avenue and Washington street in Seattle, Washington, it was run into and struck by another of the defendant's cars running from the opposite direction on the same track, as the car upon which the plaintiff was a passenger; . . . and the said defendant, its agents, servants and employees could by the exercise of proper care in the running of its said cars, have prevented the said collision, and could have prevented the injury heretofore complained of."

It will thus be seen that the complaint alleged negligence in general terms, and did not specify or rely upon any particular act of negligence for a recovery. Under such circumstances, the presumption of negligence from proof of the collision arose, and that presumption was not waived by the form of allegation contained in the complaint.

On the question of damages little need be said. By the collision of the cars the respondent was knocked down and rendered unconscious. He received a slight cut in the hand, a sprained wrist, and a bruised leg and knee, and was confined to his home for a considerable period of time. We are not much impressed with the claim that his spine was affected or his injuries permanent, but considering the physical injuries alone, no court can say that a $500 verdict was influenced by either passion or prejudice. The other grounds of the motion have already been considered, and finding no error in the record the judgment is affirmed.

HADLEY, C. J., FULLERTON, DUNBAR, and CROW, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 6846. Decided November 8, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Ellen M. Smith et al., Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY ETC., *Respondents*.[1]

CERTIORARI — SCOPE OF REMEDY — FINALITY OF ORDERS REVIEWED. Certiorari does not lie to review the denial of a motion to dismiss an action upon stipulation, under Bal. Code, § 5741, providing that the writ may issue to correct any erroneous or void proceeding when there is no appeal or any plain, speedy or adequate remedy at law.

Certiorari to review an order of the superior court for Spokane county, Poindexter, J., entered June 29, 1907, denying

[1]Reported in 92 Pac. 349.

a motion made by both parties to dismiss an action before trial. Writ denied.

P. C. Shine, for relators.

James Dawson and *F. E. Langford*, for respondents.

PER CURIAM.—This is an application for a writ of review directed to the above-named respondents. It appears that there was pending in said superior court an action wherein Ellen M. Smith was plaintiff and James Clayton Smith and Kate Smith, his wife, were defendants; that, while such action was so pending undetermined and before trial, a stipulation signed by both parties was filed in said court, requesting that said action be dismissed, and a motion to dismiss said action was made by the parties. The attorney for the plaintiff, not having been consulted with reference to said stipulation and motion, opposed the same. Prior to the filing of said stipulation and motion, the defendants' attorney had made a motion requiring the attorney for plaintiff to show his authority for appearing in said action as attorney for plaintiff. This matter came on for hearing before the respondent judge above named, who, after the hearing, made a finding to the effect that the plaintiff's said attorney was duly authorized to appear in her favor in said action. The motion to dismiss the action, based upon the stipulation as aforesaid, was by said judge denied. The writ is sought to review this action of the judge and court.

Respondent appears and demurs to the petition and objects to the issuance of the writ. It is urged that the refusal of the court and judge to dismiss said action cannot be reviewed in this kind of a proceeding. The statute, Bal. Code, § 5741 (P. C. § 1396), provides that the writ shall be granted "to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court any plain, speedy and adequate remedy at law." The majority of the judges are

of the opinion that the order sought to be reviewed is not a final determination of the cause, and for that reason not reviewable in this manner.

The writ is therefore denied.

[No. 6885. Decided November 8, 1907.]

MARY J. CONNELL, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

CARRIERS—PASSENGERS—DEGREE OF CARE—INSTRUCTIONS. It is not error to instruct that the highest degree of care and skill owed by a street railway company to its passengers is that which would be exercised by "very" careful and experienced conductors and motormen generally.

SAME — PLEADING — PRESUMPTIONS — INSTRUCTIONS — BURDEN OF PROOF. The fact that a complaint, in an action for injuries from a street car collision, is general in its terms, specifying no particular acts, does not preclude the presumption of negligence from the fact of the collision, and the jury is properly instructed that they may find for the plaintiff if the defendant's proof fails to overcome such presumption.

NEW TRIAL—GROUNDS—MISCONDUCT OF PARTY. It is not misconduct on the part of the plaintiff, in a personal injury case, which would warrant a new trial, that, during an extended argument to the jury on behalf of the defendant, plaintiff, who was very nervous as a result of her injuries, burst into a crying spell, and was taken out of court in view of the jury.

DAMAGES—PERSONAL INJURIES—EXCESSIVENESS. A verdict for $3,500 for damages sustained by a woman in a street car collision is not excessive, where it appears that she was standing in a car crowded full, was thrown violently in the mass of passengers, bruised and injured on her side, and about her ribs and spine, and rendered nervous and unable to earn her living, at her former or any other vocation.

Appeal from a judgment of the superior court for King county, Steiner, J., entered April 3, 1907, upon the verdict

[1]Reported in 92 Pac. 377.

of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in a street car collision. Affirmed.

Sachs & Hale, for appellant.

Jackson Silbaugh, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries received by the plaintiff in a collision on the defendant's railroad. The defendant owns and operates an electric railway between the city of Seattle and the town of Renton. The plaintiff was a passenger upon one of the defendant's cars when it was met upon the same track by what was known as the "line car." This was a box-like car, used for carrying freight, and was not employed for passenger service. The passenger car upon which the plaintiff was riding was moving over the track, the grade of which was practically level. Two or three blocks in front of this car the track began a steep ascent upon a grade of at least eleven per cent, and perhaps more. The line car was coming down this grade when, for some reason, its operator failed to control it. The wheels slid and the brakes failed to hold it or to check its speed. The car moved down the hill at a high rate of speed, checked somewhat after reaching the level, and plunged head on into the passenger car, causing the plaintiff's injuries. The defendant denied negligence on its part, and after a trial before a jury, a verdict was returned for plaintiff in the sum of $3,500, for which amount judgment was entered. The defendant has appealed.

It is assigned that the court erred in refusing to give the following instruction:

"With respect to the degree of care owed by the defendant to its passengers, you are instructed that the duty enjoined by the law upon defendant's conductors and motormen does not require the exercise of the highest degree of care possible to avoid an accident, but only the highest degree of care reasonably practicable under the circumstances and conditions

existing at the time and place in question. By the terms "highest degree of care," used in these instructions, is meant that degree of care which would be exercised under like circumstances by careful, prudent and experienced conductors and motormen generally."

The substance of the above instruction was given in the following modified form:

"But the defendant is not an insurer of the safety of its passengers in any and at all events. If its motormen exercised the highest degree of care to avoid the accident which is reasonably practicable under the circumstances and conditions existing at the time and place in question, the demands of the law are satisfied. By the term 'highest degree of care' used in these instructions is meant that degree of care which would be exercised under like circumstances by very careful, prudent and experienced conductors and motormen generally."

We think all essential points covered by the instruction as requested were effectively covered in the instruction as given in the modified form. The instruction as given is criticized because the court characterized the term "highest degree of care" as that which would be exercised under like circumstances by "very careful, prudent, and experienced conductors and motormen generally." The objection is to the use of the word "very" in the above connection. We see no error in the respect mentioned. The court's instruction as to the highest degree of care that should be exercised under given circumstances was in accord with the decision of this court in *Foster v. Seattle Elec. Co.*, 35 Wash. 177, 76 Pac. 995. It seems almost axiomatic that only very careful, prudent, and experienced operators of cars can exercise the highest degree of care.

It is assigned that it was error to give the following instruction:

"If you should find that the motorman of either car failed to exercise the judgment, care, caution and skill which was necessary under all the existing circumstances, and that they, or either of them, failed to exercise the care, judgment, caution and skill usually and customarily attendant in like condi-

tions and circumstances, then the defendant has failed to overcome the imputation of negligence in operating said cars arising in case of such collision, and you should find for the plaintiff and give her such damages as you find she has sustained, if all the other elements of her cause of action have been proved to your satisfaction."

It is argued that the instruction without limitation erroneously placed upon appellant the imputation of negligence based upon the admission by appellant that a collision did in fact occur. It is conceded to be the rule where two cars of the same railway company collide, that a presumption of negligence arises against the company which it must overcome in order to escape liability for injuries received in such collision. It is, however, further contended that, if a plaintiff avers more than general negligence and relies upon some particular acts of negligence, the rule is different, and that by the allegation of such particular negligence a plaintiff is limited in his proofs to that subject, and assumes the burden of proving that the defendant is guilty of the particular negligence alleged. Without passing upon the merits of appellant's argument in the above respect, when applied to certain pleadings and issues, it is sufficient to say that we do not see its relevancy to the issue tendered by the complaint in this case. The complaint simply charges that the appellant, its agents and servants, so carelessly and negligently operated the cars that they came together in a head-on collision, and that by the exercise of proper care the collision could have been avoided. The allegations as to negligence are in very general terms. The fact of the collision was admitted and, under the pleadings, the imputation of negligence then arose against appellant. There was evidence introduced by appellant bearing upon the acts and limitations of the two motormen under the circumstances, and we think it was not error for the court to instruct the jury that if they found such acts were not consistent with the care required by law, then the appellant had failed to overcome the imputation of negligence. We find no prejudicial

error in the instructions given, or in the refusal to instruct in the form requested.

It is contended that it was error to deny appellant's motion to set aside the verdict and to grant a new trial. One ground urged is misconduct of respondent at the trial of the case. The following record was made at the trial:

"During the argument of Mr. Sachs to the jury, on behalf of the defendant, the following proceedings occurred, to wit: Mr. Sachs: If the court please, I ask that the record show the facts of what happened at this time. The Court: Oh, it is a matter the court has no control over at this time. Do you raise any objection? Mr. Sachs: Yes, your Honor. The Court: Make your statement. Mr. Sachs: I ask the record to show that during the argument of counsel for defendant, and at the time he is about to close, that the plaintiff in this action burst out into a crying spell, trembling and so forth, and was taken suddenly out of the court, in view of the jury, by those who were with her at the time. The Court: Let the record show at what time this occurred, Mr. Sachs. Mr. Sachs: I say during the argument for the defendant and at the time of the closing. The Court: Yes; after how long engaged in addressing the jury. Mr. Sachs: I think about half an hour. The Court: I think it is over an hour, Mr. Sachs. Mr. Sachs: Is it an hour? Whatever time it was—I don't remember."

It certainly cannot be said from the above record that respondent was intentionally guilty of any misconduct. She had been engaged in a long trial, and the evidence tends to show that she was very nervous as the result of her injuries. The remark made by the court indicates that appellant's counsel had been making an extended argument to the jury in the case, and it is not unreasonable to infer, based upon the evidence, that such an argument may have involved criticism of her to such an extent that, as a nervous woman, she was unavoidably overcome in the manner indicated. We shall not say the facts appearing in the record show misconduct.

It is further urged that a new trial should have been granted on the ground of excessive damages returned by the jury. We have carefully read the evidence and we find testi-

mony to the following effect: Respondent was standing and holding to a strap in a car crowded full of passengers. The force of the collision threw her violently in the mass of passengers, and she was much bruised about her side and injured about her ribs and spine. She was shown to be very nervous since the accident, although she was reasonably strong and well before. For years she had worked and earned her own living expenses. At the time of the injuries she was employed in the store of Stone, Fisher & Lane, in Seattle, in the alteration of ladies tailor-made gowns; but since the accident she has been unable to follow that vocation or any other. Under such evidence we shall not say that the verdict was excessive.

The judgment is affirmed.

RUDKIN, FULLERTON, DUNBAR, and CROW, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 6928. Decided November 8, 1907.]

S. B. ASIA, *Appellant*, v. HERMAN E. POOL, *Respondent*.[1]

NUISANCE—SUFFICIENCY OF EVIDENCE. The evidence is sufficient to show a nuisance in maintaining a fish market in an improper and obnoxious manner, where the evidence of many witnesses from the immediate vicinity was to the effect that offensive fumes and odors from shellfish, boiled or stored in an improper manner, permeated the atmosphere, and the same was not disputed except by negative testimony of persons occasionally in the market; and it was error to dismiss an action to abate the same.

SAME — DAMAGES — EVIDENCE — SUFFICIENCY. The plaintiff, conducting a mercantile business, should not be denied damages from a nuisance in the maintenance of a fish market in an improper and obnoxious manner from the fact that he cannot state definitely the amount of loss sustained, where it appeared that offensive odors from the improper boiling or storing of shellfish permeated his goods, materially interfered with his trade, and the sales and volume of his business fell off largely, and testimony was given as to the value of goods carried in stock and the volume of business done before and after the location of the market.

[1]Reported in 92 Pac. 351.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 16, 1907, in favor of the defendant, after a trial before the court without a jury, dismissing an action to abate a nuisance, and for damages. Reversed.

Dennis & Burdick, for appellant.

Campbell & Powell, for respondent.

Root, J.—This is an appeal from a judgment of dismissal in an action for damages, brought by appellant against respondent, on account of the latter's maintaining a market where all kinds of fresh and salt fish, oysters, clams, and crabs were kept in a manner alleged to have been so offensive as to constitute a nuisance. Appellant was operating a mercantile business in a store almost immediately over the rooms occupied by said market, and was engaged in selling drygoods, clothing, ladies' furnishing goods, and millinery, and was there in business before respondent located his business below. This action was instituted to have the market declared a nuisance and to abate the same, and for damages. After the commencement of the action and before a trial, the respondent quit the premises and removed his business elsewhere. The trial was had solely upon the question of right and amount of damages.

There was considerable conflict in the evidence as to the manner in which the market was conducted. Respondent placed upon the witness stand numerous witnesses who testified that his business was conducted in a first-class manner, and the premises kept as cleanly and free from odors as could be ordinarily done by a person operating a fish market. Two or three testified they thought it was the best kept market in Tacoma. Most of these witnesses, however, were persons who were not at or in the immediate vicinity of the market continuously, but dropped in from time to time to make purchases, or for other purposes. The appellant testified that, on account of the boiling of crabs and the storing of fish and shellfish and maintaining them in an improper manner, very offensive

odors came up through the building into his store, permeated his goods, and materially interfered with his trade; that on account thereof the volume of his business fell off largely, although he was unable to state definitely the amount of loss sustained on account thereof. Several of the clerks in his store testified that this odor permeated appellant's store and at times was so pronounced and obnoxious as to make them sick; that customers spoke of it and frequently left the store immediately because thereof. Immediately above the store of appellant were the Y. W. C. A. rooms, the secretary of which organization testified that the odors from the market came up into those rooms to such an extent that the atmosphere was made very disagreeable. One of the city's sanitary inspectors gave testimony as to visiting the market upon different occasions and finding very offensive fumes arising from the water in which crabs were or had been boiling, and from fish or shellfish stored in an improper manner. The owner of a nearby shoe store stated upon the witness stand that the smell was "awful." The wife of a prominent Tacoma citizen testified that she visited appellant's store as a customer and that the fumes were so offensive that she made inquiries as to what was the matter. The positive testimony of this inspector, of the Y. W. C. A. secretary, of the shoe-store man and customers, and of the clerks in the store as to the prevalence of these obnoxious odors was not disputed, except in the negative manner as hereinbefore stated.

The case was tried by the judge of the superior court sitting without a jury. His reasons for dismissing the action are not set forth in the record. But it is urged by respondent in his brief that the trial judge did not believe the evidence proved the market to have been a nuisance, and did not believe that the evidence as to damages was definite enough to permit an award therefor. The case having been tried without a jury, it becomes necessary for us to try it *de novo* upon the record brought here. From the undisputed evidence and from a consideration of the testimony taken as a whole, we cannot escape

the conclusion that this market as operated by respondent constituted a nuisance to this appellant.

As to the ascertainment of the amount of damages occasioned appellant by the maintenance of the market in the manner shown, there must, from the nature of the injury, be uncertainty and difficulty. Appellant testified as to the quality and value of the goods carried in stock and as to the volume of business done before and after the location of the market, and as to other matters having a bearing upon the amount of business done during the respective periods covered. His evidence showed a large falling off of sales during the time the market was there. How much of this was due to the presence of respondent's business cannot be determined, but that some of it was attributable thereto is beyond question. It would be practically impossible for appellant or any one else to know or ascertain with anything like mathematical nicety the amount of business driven from his store by reason of these obnoxious odors. The very nature of the injury shows that the damage could not be calculated with any considerable degree of accuracy; but that such conditions wrought a substantial injury to the appellant could not well be doubted; and it is the law that in cases of this character the injured party shall not be sent from the court remediless because the precise amount of damages is not ascertainable. In such cases the court or jury is called upon to make such an award as under all the circumstances would seem to be equitable and just without being excessive, to the end that substantial justice may be approximated, although impossible of accurate measurement.

We think that the appellant is entitled to a judgment against the defendant in some amount. The case is reversed and remanded to the superior court, with directions to ascertain the amount of damages. A jury may be had for this purpose if either side demands the same and pays the fee therefor.

Hadley, C. J., Fullerton, Rudkin, Dunbar, and Crow, JJ., concur.

[No. 7008. Decided November 9, 1907.]

FRITZ NOELLE, *Respondent*, v. HOQUIAM LUMBER & SHINGLE COMPANY, *Appellant*.[1]

MASTER AND SERVANT—FACTORY ACT—CERTIFICATE OF INSPECTION—EVIDENCE. The certificate issued by the commissioner of labor upon the inspection of a factory is only *prima facie* evidence that dangerous machinery therein has been guarded in compliance with the factory act.

WITNESSES—PRIVILEGED COMMUNICATIONS—PHYSICIANS—WAIVER. In an action for personal injuries, the plaintiff does not waive the right to object to testimony by his physician by the fact that he himself testified as to the cause and extent of his injuries and described them as he saw and felt them, without reference to what his physician told him; Bal. Code, § 5994, subd. 4, prohibiting such testimony by a physician without the consent of his patient (ROOT, J. and HADLEY, C. J., dissenting).

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 25, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill. Affirmed.

R. S. Eskridge, Philip Tindall, and *William E. Campbell*, for appellant.

Govnor Teats and *H. J. Hughes*, for respondent.

MOUNT, J.—Respondent recovered a judgment against the appellant on account of personal injuries received while working in appellant's mill. The appellant presents two principal questions for our consideration. The first is that a certificate of approval, issued by the commissioner of labor under the factory act of 1905, is conclusive of the facts therein certified to by that officer. The second, that where the plaintiff described his injuries without reference to what his attending

[1]Reported in 92 Pac. 372.

physicians told him, he thereby waived the privilege of secrecy enjoined by statute upon the physicians.

The first question was determined by us in *Vosberg v. Michigan Lumber Co.*, 45 Wash. 670, 89 Pac. 168, where we said:

"But the statute itself (Laws 1905, page 164, § 7) makes the certificate only prima facie evidence of a compliance with the provisions of the act, and the court performed its full duty in this respect when it charged the jury to the effect that the certificate was prima facie evidence of a compliance with the statute, and that the burden was on the respondent to overcome that evidence by showing that the gearing causing the injury was not reasonably safeguarded."

See, also, *Noren v. Larson Lumber Co.*, 46 Wash. 241, 89 Pac. 563; *Boyle v. Anderson etc. Lumber Co.*, 46 Wash. 431, 90 Pac. 433. The act is clear upon the question, and we have no desire to modify our opinion in the cases cited.

Upon the other question, the plaintiff at the trial testified as to the character of the injuries he received, but did not testify in regard to what the physician who cared for his wounds told him, or as to what the physician did for him. Dr. Campbell, who attended the plaintiff from the outset and who dressed the wounds at the hospital the first time, died shortly before the trial. Two other physicians, who were connected with the hospital, who were associated with Dr. Campbell, and who helped to dress the wounds, were present at the trial. These doctors were called as witnesses by the appellant to testify to the extent of respondent's injury, but upon respondent's objection, the court excluded their evidence under the statute relating to privileged communications. Bal. Code, § 5994 (P. C. § 940). It is argued by appellant that this ruling was error, for the reason that the respondent himself having testified as to the character and extent of the injury he thereby waived his privilege in regard thereto. The statute is as follows:

"The following persons shall not be examined as witnesses: . . . 4. A regular physician or surgeon shall not, without

the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient; . . ."

It is clear that, with the consent of the patient, his physician may be called and divulge all the information he has learned in his professional capacity; otherwise not. Many authorities are cited by appellant to the effect that, where the patient himself calls the physician as a witness and permits him to testify concerning the ailment, treatment, and the advice given, this constitutes a waiver of the privilege; and also where the patient testifies to what happened in the presence of the physician or the advice and treatment given or statements made by the physician, the privilege is also waived. The cases so holding are based upon the reason that the patient himself, by testifying in regard to facts which he might have kept secret, thereby breaks the seal of privilege and waives the right to object, because the statute does not intend that such privilege shall be used both as a sword of offense and at the same time as a shield of defense.

No case has been called to our attention which holds that a person may not describe his injuries as he sees and feels them, without a reference to what his attending physician or surgeon may have told him, and that an adverse party may then call such physician and prove by him that the patient is mistaken or has testified untruthfully. On the other hand, the supreme court of Montana, in the case of *May v. Northern Pac. R. Co.*, reported in 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111, which is a case very much like this, under a statute like ours, held that a patient, by testifying to the cause of her injuries and their nature and extent, did not thereby waive the privilege granted by the statute. This is a well-considered case and many of the authorities are there collected and discussed. It is directly in point, and the conclusion of that court upon this question accords with our views, and is, we believe, in accord with the weight of authority.

It is perhaps true, as argued by appellant, that the injured party and the attending physician may be the only persons who have knowledge of the extent of an injury, and that if the physician may not testify thereto, great injustice may be done. This, of course, argues against the policy of the statute, which rests with the legislature and not with the courts, and would annul the provisions of the statute entirely. The legislature made no exception to the rule of secrecy where it was necessary to contradict falsehood, but provided for an exception only in case of consent of the patient. No doubt sufficient reason appeared why this should be the only exception. We think the court did not err in excluding the evidence of the attending physician.

The judgment must therefore be affirmed.

CROW, DUNBAR, RUDKIN, and FULLERTON, JJ., concur.

ROOT, J. (dissenting)—I dissent from that portion of the opinion that holds that a physician and surgeon cannot testify to the nature and extent of an injury to a patient after the latter has himself voluntarily testified thereto. The statute in question, being in derogation of common law, must be strictly construed against him who invokes its aid. The purpose of a trial is to elicit the truth. The truth, when material to an issue, should be suppressed only when its utterance would contravene some recognized principle of public policy. A physician is properly prohibited from revealing the secrets of his patient. Public policy requires that persons needing the advice or professional assistance of a physician or surgeon should know that they may consult and employ one without any fear of their ailment or condition becoming known by reason of anything such medical man may do or say. But when the patient himself reveals to the world the nature and extent of his injury or ailment, there remains no longer any occasion for secrecy. He in effect says that he no longer desires to keep the matter a secret. When, in a case like this, he so testifies and seeks by that testimony to obtain money

from another because of that condition, the truth of the matter becomes of much more importance than the useless silence of the doctor.

After this respondent voluntarily testified to his condition, what reason remained for keeping the doctor silent? What public policy held the lips of the physician as to a matter which the patient had publicly proclaimed? If the patient upon the witness stand told the truth, the doctor, it may be presumed, would have corroborated him. If the patient testified falsely, is it public policy to shield him and make his injury triumphant by suppressing the truth which the doctor would be presumed to give? Is this statute intended as an invitation to perjury and a cover for fraud? The statute is a good one; but it was not intended as a shield for perjury, fraud, and dishonesty. After this respondent went upon the witness stand and voluntarily testified about his wound, the matter was no longer a secret. He made it public. It being by him thus published to the world, the injunction of secrecy no longer rested upon the doctor. When the reason of a rule or statute fails, the application of the rule or statute fails. The liberty and property of the citizen must often depend upon his ability to establish in court the truth of a given matter. If he is refused the right to furnish testimony showing the truth, he is thereby, in effect, deprived of his liberty and property. Such a result can be tolerated under our form of government only where there is a well-recognized public interest which demands the suppression of the truth.

In support of these views, I may cite from many authorities the following: In the case of *Hall & Paulson Furniture Co. v. Wilbur*, 4 Wash. 644, 30 Pac. 665, this court spoke as follows:

"Wilbur, one of the appellants, was required on cross-examination to answer questions tending to disclose what advice his attorney gave him concerning the advisability of resisting the respondent's demands. . . . But the course permitted by the court did not violate the rule as to confidential commu-

nications between attorney and client, because the client himself first opened the matter."

In the case of *Hunt v. Blackburn*, 128 U. S. 464, 9 Sup. Ct. 125, 32 L. Ed. 488, the supreme court of the United States, in dealing with the principle here involved, although in a case not so strongly for the appellant as this, said:

"But the privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney. When Mrs. Blackburn entered upon a line of defence which involved what transpired between herself and Mr. Weatherford, and respecting which she testified, she waived her right to object to his giving his own account of the matter."

The court of appeals of New York, in *McKinney v. Grand Street etc. R. Co.*, 104 N. Y. 352, 10 N. E. 544, used this language:

"The patient cannot use this privilege both as a sword and a shield, to waive when it enures to her advantage, and wield when it does not. After its publication no further injury can be inflicted upon the rights and interests which the statute was intended to protect, and there is no further reason for its enforcement. The nature of the information is of such a character that when it is once divulged in legal proceedings, it cannot be again hidden or concealed. It is then open to the consideration of the entire public, and the privilege of forbidding its repetition is not conferred by the statute. The consent having been once given and acted upon cannot be recalled, and the patient can never be restored to the condition which the statute, from motives of public policy, has sought to protect. . . . The object of the statute having been voluntarily defeated by the party for whose benefit it was enacted, there can be no reason for its continued enforcement in such case."

Webb v. Metropolitan Street R. Co., 89 Mo. App. 604, was a case wherein the court of appeals of Missouri expressed its views upon this question as follows:

"She voluntarily lifted the veil of secrecy by going on the stand and testifying to the different treatments of the differ-

ent doctors. She was allowed to fortify her case in this way by the silent testimony of those whose acts and words (indirectly) she invoked, but whose mouths she closed by the shield of the statute. If such be the law, it can be made destructive to the rights of third parties. There would be no safety against its evil tendencies in the hands of unscrupulous persons. That which was intended by the legislature to hide, as with a veil, the secret and sacred confidences of the sick room, should not be used as a snare for the judge and jury. There was a want of candor and fairness in such a course that at once challenges the sense of justice. It is a game of hide and seek, to be played by one side alone, to the utter helplessness and confusion of the other side. A sense of judicial responsibility forbids us giving our consent to a rule that, on its face, is so unfair and so unjust. He who invokes the statute must do so with the full and unqualified understanding that it is a shield to him and not a sword for others. That its beneficent object is to protect him in his rights and not to impair those of his adversary. We hold that the physicians, whose evidence was offered, were competent witnesses under the facts."

The supreme court of Nevada, in *State v. Depositor*, 21 Nev. 107, 25 Pac. 1000, said:

"Her testimony was of a nature to make public all matters bearing upon the injuries and sufferings of the child as affected by the defendant's acts. It practically disclosed the general nature of the complaint for which the physician prescribed. If any injury could be inflicted by testimony of this nature it was done by the mother's testimony, and, the facts having once been exposed, it would seem that there was no reason why the physician's knowledge should be treated as confidential."

In *Lane v. Boicourt*, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. 442, the supreme court of that state gave this expression:

"The testimony given by the witnesses of the appellee broke the seal of privacy, and gave publicity to the whole matter. The patient waived the statutory rule. The course pursued laid the occurrence open to investigation. Nothing was privileged, since all was published. The statute was not meant to

apply to such a case as this, nor is it within the letter or the spirit of the law. If a patient makes public in a court of justice the occurrences of the sick room for the purpose of obtaining a judgment for damages against his physician, he cannot shut out the physician himself, nor any other who was present at the time covered by the testimony. When the patient voluntarily publishes the occurrence, he cannot be heard to assert that the confidence which the statute was intended to maintain inviolate continues to exist. By his voluntary act he breaks down the barriers, and the professional duty of secrecy ceases. It would be monstrous if the patient himself might detail all that occurred, and yet compel the physician to remain silent. The principle is the same whether the physician called is a consulting physician, or is the defendant. The opening of the matter to investigation removed the obligation of secrecy as to all, not merely as to one. When the obligation to silence is broken, it is broken for the defendant as well as for the plaintiff."

The supreme court of New York, in *Schlotterer v. Brooklyn etc. Ferry Co.*, 89 App. Div. 508, 85 N. Y. Supp. 847, discussed the question in this manner:

"The purpose of the statute is to cover the relation of physician and patient with the cloak of confidence. But the purpose is to save the patient from possible humiliation or distress, not to enable him to win a lawsuit. . . . In my opinion, the language of the statute does not authorize a construction which affords the privilege notwithstanding the reason for its continuance has ceased to exist."

In *Rauh v. Deutscher Verein*, 29 App. Div. 482, 51 N. Y. Supp. 985, the court expressed itself as follows:

"And it would appear to be equally unfair and unreasonable to allow a plaintiff—the one most interested in the recovery—to testify to what took place at the time of the examination by the physicians, or of the operations that were performed or the treatment received, and at the same time enjoin silence upon the physician. A physician, when called, may be said to be, under ordinary circumstances, a disinterested witness. His professional position and his reputation would of themselves be a pledge for his not intentionally violating his oath, and generally he would have no great object

in making a false statement as to the result of his investigations, while his professional knowledge would enable him to state correctly the result of his investigation and the treatment he prescribed or the operations he performed. In the case, however, of a plaintiff, irrespective of the interest that he would have in coloring the testimony to suit his case, his lack of professional knowledge would expose him to mistakes in testifying, and would make it quite possible, with the utmost good faith on the part of the party testifying, that the testimony would be grossly misleading. It must be apparent that such a rule would work the greatest injustice, and would expose the defendant to danger on account of the fact that the rule would prevent him from examining into the truth of the plaintiff's statements. . . . The physician would certainly be allowed to contradict the fact testified to by plaintiff. . . . We think, therefore, it was error to exclude the testimony of this physician to the condition of the plaintiff when she came to the hospital, and as to the operations he performed upon her, and the result of these operations."

In the case of *Morris v. New York etc. R. Co.*, 148 N. Y. 88, 42 N. E. 410, 51 Am. St. 675, the court of appeals of New York used this language:

"It is a case where two physicians attended the patient, both holding professional relations to her, and in a suit in which the nature and extent of her injuries (as then appearing) is the important inquiry, she calls one of them and the defendant the other. She has the right, unquestionably, to avail herself of the testimony of the one which she thinks will be the most favorable for her case, but the question is whether she can at the same time deprive the defendant of the benefit of the testimony of the other. . . . In this case it was the privilege of the plaintiff to insist that both physicians should remain silent as to all information they obtained at the consultation, but she waived this privilege when she called Dr. Payne as a witness and required him to disclose it. The plaintiff could not sever her privilege and waive it in part and retain it in part. If she waived it at all it then ceased to exist, not partially, but entirely. The testimony of Dr. Payne having been given in her behalf, every reason for excluding that of his associate ceased. . . . We think that a construction of the statute which permits a patient who has been at-

tended by two physicians at the same examination or consultation to call one of them as a witness to prove what took place or what he learned, thus making public the whole interview, and still retain the right to object to the other, is unreasonable and unjust, and should not be followed. The waiver is complete as to that consultation when one of them is used as a witness. The considerations and reasons upon which the statute was founded no longer exist when full disclosure is made by either with the consent of the patient, and every party to the transaction thus disclosed is relieved from any injunction of secrecy. . . . Upon every principle of reason and justice this act amounted to a waiver of the right to object to the testimony of the other physician when called by the defendant, as to the same transaction."

In *Treanor v. Manhattan R. Co.*, 28 Abb. New Cas. 47, this language is employed:

"Although the statute prescribes an express waiver, the court of appeals has decided that it may be inferred from conduct. . . . The thing forbidden by the code is the disclosure of professional information, and the policy of the enactment is to protect patients in the free revelation of their maladies to their physician. But what if in order to enforce a claim against a stranger, the patient himself promulgate the information, and uncovers his maladies and infirmities in court; does he not thereby break the seal of secrecy and absolve the physician from the obligation of silence? Does he not, in the strictest and most emphatic sense, waive his privilege? Is it to be tolerated that, to mulct another in damages, he may inflame a jury with a false or exaggerated story of his injuries and suffering, and yet a physician whom he has consulted is not to be allowed to prevent the meditated injustice by a truthful statement of the case?"

Greenleaf, Evidence (16th ed.), Vol. 1, § 247a, contains the following:

"As to the policy of the privilege, and of extending it, there can only be condemnation. The chief classes of litigation in which it is invoked are actions on policies of life insurance, where the deceased's misrepresentations as to health are involved; actions for corporal injuries, where the plaintiff's bodily condition is to be ascertained; and testamentary ac-

tions, where the testator's mental condition is in issue. In all of these cases the medical testimony is 'the most vital and reliable,' 'the most important and decisive,' and is absolutely needed for purposes of learning the truth. In none of them is there any reason for the party to conceal the facts except to perpetrate a fraud upon the opposing party, and in the first two of these classes the advancement of fraudulent claims is notoriously common. . . . In litigation about wills, policies, and personal injuries, the privilege, where it exists, is known in practice to be a serious obstacle to the ascertainment of truth and a useful weapon for those interested in suppressing it."

Wigmore, Evidence, Vol. 4, at §§ 2380, 2388, and 2389, discusses the question at length, making, among others, the following observations:

"That the relation of physician and patient should be fostered no one will deny. But that the injury to that relation is greater than the injury to justice—the final canon to be satisfied—must most emphatically be denied. The injury is decidedly in the contrary direction. Indeed, the facts of litigation today are such that the answer can hardly be seriously doubted. Of the kinds of ailments that are commonly claimed as the subject of the privilege, there is seldom an instance where it is not ludicrous to suggest that the party cared at the time to preserve the knowledge of it from any person but the physician. From asthma to broken ribs, from ague to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by every one—except the appointed investigators of truth. The extreme of farcicality is often reached in litigation over personal injuries,—in the common case, a person injured by a street-car amid a throng of sympathizing onlookers. Here the element of absurdity will sometimes be double; in the first place, there is nothing in the world, by the nature of the injury, for the physician to disclose, which any person would ordinarily care to keep private from his neighbors; and, in the second place, the fact which would be strenuously secreted and effectively protected, when the defendant called the plaintiff's physician and sought its disclosure, would be the fact that the plaintiff was not injured at all! Upon such

foundation of vain imaginations is the privilege reared. The injury to justice by the repression of the facts of corporal injury and disease is a hundred fold greater than any injury which might be done by disclosure. . . .

"The privilege may be waived, like all other privileges. It is astonishing to find that this question could ever have been regarded as debatable. Nothing but a confusion of fundamental ideas could ever create any doubt. . . . A waiver is to be predicated, not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege. . . .

"In the first place, the *bringing of an action* in which an essential part of the issue is the existence of physical ailment should be a waiver of the privilege for all communications concerning that ailment. The whole reason for the privilege is the patient's supposed willingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist. . . . In actions for *personal injury*, the permission to claim the privilege is a burlesque upon logic and justice. . . . The *party's own voluntary testimony*, on trial, to his physical condition in issue, should be a waiver of the privilege for the testimony of a physician who has been consulted about the same physical condition in issue; . . . Certainly it is a spectacle fit to increase the layman's traditional contempt for the chicanery of the law, when a plaintiff describes at length to the jury and a crowded courtroom the details of his supposed ailment and then neatly suppresses the available proof of his falsities by wielding a weapon nominally termed a privilege."

See, also, *Lawson v. Morning Journal Ass'n*, 32 App. Div. 71, 52 N. Y. Supp. 484; *Hennessy v. Kelley*, 30 Misc. Rep. 703, 64 N. Y. Supp. 562; *Marx v. Manhattan R. Co.*, 10 N. Y. Supp. 159; *Rauh v. Deutscher Verein, supra; Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 32 N. W. 610, 8 Am. St. 894; *Campau v. North*, 39 Mich. 606, 33

Am. Rep. 433; 23 Am. & Eng. Ency. Law (2d ed.), 91; 4 Current Law, p. 1955; *Highfill v. Missouri Pac. R. Co.*, 93 Mo. App. 219; *Lane v. Boicourt, supra.*

Both upon principle and authority, I think the physician should have been permitted to testify.

HADLEY, C. J., concurs with Root, J.

[No. 6888. Decided November 12, 1907.]

O. S. JOHNSON, *Respondent*, v. HOWARD JOSLYN, *Appellant*.[1]

APPEAL—ORDERS REVIEWABLE—FINALITY. An order accepting a receiver's report and ordering his discharge is appealable as a final order.

SAME—MATTERS DETERMINED ON FORMER APPEAL—DISMISSAL. An appeal will not be dismissed on the ground that the matters were determined in a former appeal where it is patent on the face of the motion that, if granted, the appellant could not enforce the orders made by the appellate court.

SAME—AMOUNT IN CONTROVERSY. An appeal from an order discharging a receiver, wherein is involved the disposition of $135 collected by him, will not be dismissed because not within the constitutional limit, $200, for actions at law for the recovery of money.

SAME. The supreme court will assume jurisdiction of a case where the amount involved is less than $200, where the appeal is in reality an attempt to compel the lower court to obey the mandate of the supreme court upon a former appeal.

SAME—DECISION—MANDATE—CONSTRUCTION. Where the matter involved was the sum of $135 collected by a receiver, and on appeal and reversal of the judgment the appellate court found that the appellant was entitled thereto, and issued a mandate "directing payment to appellant of all money now in the receiver's possession which he had collected from the city of S. since January 5, 1906," the mandate was intended to refer to the $135 in dispute, so collected, regardless of whether it was "now in the receiver's possession," which was a mere inaptitude of expression.

[1]Reported in 92 Pac. 413.

APPEAL—DECISION—EFFECT OF REVERSAL—PAYMENT PENDING APPEAL—RECEIVERS. Money paid out by a receiver under order of court, after notice of appeal from the order, but before the appeal was perfected, is paid out at the peril of the receiver, who, upon reversal of the order, must look to the parties to whom it was paid.

Appeal from an order of the superior court for King county, Gilliam, J., entered April 27, 1907, accepting the report of a receiver and ordering his discharge. Reversed.

J. W. Langley and *Robert D. Hamlin*, for appellant.

J. E. McGrew (*E. P. Dole*, of counsel), for respondent.

DUNBAR, J.—This appeal involves the disposition of the sum of $135, collected by the receiver and alleged to have been paid to the respondent May 14, 1906, on account of a judgment which the respondent Johnson had theretofore obtained against the appellant Joslyn. The receiver had for some time been collecting the salary due from the city of Seattle to appellant Johnson, and under the directions of the court had paid a certain amount to Joslyn, and had applied the balance on respondent's judgment.

This is the second appeal in this case. The opinion of this court on the first appeal is reported in 45 Wash. 310, 88 Pac. 324, where a full and complete statement of the case may be found. The appeal in that case was from the order of the court refusing to discharge the receiver and order the payment of $135 to the respondent Johnson. After the remittitur from this court had been filed in the court below, the receiver made his report, in which he reported the collection of certain moneys and the payment of a portion thereof to the respondent Johnson; that at the time the report was made he had no money in his possession belonging to the defendant Joslyn, and that said money was collected and distributed under the direction of the court. This report was excepted to on the part of the appellant, and upon the report being accepted, this appeal was taken.

The court found that the receiver had no money of the appellant on hand, and ordered that he be discharged. The contention and showing of the appellant below was that, since the judgment had been rendered against him and since the appointment of the receiver, he had received his discharge in bankruptcy, and that the judgment theretofore was of no avail. The respondent moves to dismiss this appeal, for the reasons, (1) that the order made by the superior court from which the appeal is prosecuted is not a final order made after judgment and which affects a substantial right; (2) that the matters sought to be reviewed on this appeal were determined on the former appeal; and (3) that the amount involved in the order from which the appeal is prosecuted is less than $200, the constitutional limit put upon appeals.

We think it so plainly appears that the order from which the appeal is taken is a final order made after judgment and affecting a substantial right, that a discussion is not called for. As to the second ground of appeal, it is patent on its face that if this motion should prevail this appellant would be remediless, for he could not enforce the orders of this court in his behalf.

Considering the third ground of the motion, we are inclined to the opinion that this case does not fall within the constitutional limitation. But even if it did, so far as the amount of money is concerned, it is in reality an attempt on the part of the appellant to compel the lower court and its officer to obey the mandate of this court, and in such a case this court must necessarily assume jurisdiction to compel the enforcement of its orders and decrees; and while it is possible that the writ of mandate may have been a more direct remedy, yet, the result being the same, the court, under the liberal provisions of our code, will not too closely scrutinize the mere form of the action in which the remedy is sought.

So far as the merits of the proposition are concerned, it seems plain that the mandate of this court was not enforced

by the trial court. After a review of the case this court, in the case above referred to, said:

"The appellant pleaded the discharge in this action, and upon such plea was based his application for relief from the judgment and a discharge of the receiver. We think he has been discharged from liability on respondent's judgment, that his application should have been granted, and that the trial court erred in refusing the same. The judgment of the superior court is reversed, and the cause is remanded, with instructions to enter an order discharging the receiver, and also directing payment to the appellant of all money now in the receiver's possession, which he has collected from the city of Seattle since January 5, 1906."

It is evident that the court placed too narrow a construction upon the language used by this court in the sentence, "all money now in the receiver's possession." It is not difficult, it seems to us, to determine from the language itself that the court meant to direct the payment of all moneys which had been collected by the receiver since January 5, 1906, and that the words "now in the receiver's possession" were a mere inaptitude of expression; that the court was attempting to give substantial relief to the appellant concerning the matter which was the subject of the appeal, and the matter which was the subject of the appeal was the disposition of the money in the hands of the receiver at the time the order which was appealed from was made. Otherwise the appellant, though prevailing in this court, could receive no benefit of his appeal.

It is contended that, inasmuch as the receiver acted under the order of the court, his action must be approved by this court. However, the money which the receiver paid out, as shown by his report, was paid out after the trial and after notice of appeal had been given but before the appeal had been perfected. Under such circumstances the money having been paid during the time the appeal was available to the appellant, the receiver paid it at his peril; and if it is finally concluded that it was illegally or wrongfully paid, he must

look to the persons to whom he paid it for reimbursement. *In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945.

The judgment will be reversed, and the cause remanded with instructions to the lower court to disapprove the report of the receiver, and to order such receiver to pay to the appellant the sum of $135, the amount in controversy.

FULLERTON, MOUNT, and RUDKIN, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 6899. Decided November 12, 1907.]

In the Matter of HARVARD AVENUE NORTH, SEATTLE.

S. S. LOEB *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS — BENEFITS. The fact that a street was so improved that a street railway company seeks to extend its line thereon may be shown as an element of special benefit to the property in the district.

SAME—PROPERTY BENEFITED—EXTENT—COMMISSIONER'S DECISION. The assessment of benefits by commissioners being reasonably fair, their decision as to the extent of the property benefited should not be disturbed, Laws 1893, p. 196, § 22, placing the duty of determining the district upon the commissioners.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 16, 1907, after a hearing on the merits, approving an assessment roll, made by commissioners appointed to levy a special assessment upon property specially benefited by a municipal improvement. Affirmed.

Hastings & Stedman, for appellants.

Scott Calhoun and *O. A. Tucker*, for respondent.

HADLEY, C. J.—This is the appeal of Henry Fuhrman from the judgment of the superior court, approving the

[1]Reported in 92 Pac. 410.

assessment roll in the matter of the laying out, extending, and establishing of Harvard Avenue, North, in the city of Seattle. Since the appeal was taken, the appellant died testate, and by virtue of the stipulation of counsel in the cause, the executors of the deceased, viz., S. S. Loeb, S. L. Crawford, and M. F. Backus, are hereby ordered substituted as appellants in the place of the deceased.

The errors assigned are, (1) that the court should have found that the assessments against appellant's various parcels of land were arbitrarily, unfairly, and fraudulently made; (2) that it was error to refuse to set aside the assessment roll or to reduce the amount of the assessments against appellant's parcels of land; (3) that it was error not to vacate the roll and direct the commissioners to make a new roll including property north of Lake Union.

We think the first assignment of error is not supported by the record. An effort was made at the trial to show that a personal controversy existed between the appellant Fuhrman and one of the members of the city council of the city of Seattle, and that in an indirect way this controversy was used as the basis for influencing the commissioners to make an unfair assessment roll against appellant's property. Respondent contends that the facts in relation to such a controversy were irrelevant to the subject before the court, and that the question to be determined was the mere independent fact whether an unfair and fraudulent assessment had been made. Whether that evidence may have had a proper bearing upon the question of bad faith on the part of the commissioners or not, we, in any event, fail to find justification in the evidence for the contention that the commissioners' assessment was made as the result of bad faith.

In reference to the second assignment of error, it is urged that the evidence shows that the improvement is of little, if any, benefit to the property included within the assessment district, and that it will be of no practical benefit to anyone except to the street railway company. The improvement, it is

true, may afford the railway company more convenient facilities for the extension and construction of its line; but such fact does not establish that benefit does not accrue to the property in the district. The mere fact that a street is so improved that a street railway seeks to extend its line thereon may well be considered as an element of special benefit to the neighboring property. There was some conflict in the evidence upon the subject of benefits, but there was ample evidence to support the court's finding that the property was benefited to the extent of the assessment.

It is contended under the third assignment of error, that the district should have included property to the north of Lake Union, which it is claimed is benefited by the improvement as much as that which lies within the district as established. As respondent suggests, it is often difficult to determine the dividing line between property that is specially benefited and that which receives mere general benefits from the improvement. There must, however, be such a dividing line. In a sense, all property in a city proximate to the neighborhood of the improvement and having indirect connection by neighborhood routes with the improvement may receive benefit. But it can scarcely be classed as special benefit which is a benefit peculiar to particular property and differing from that which the general property of a community receives from a new improvement as a mere public enterprise. Some one must determine what property is specially benefited, and as we said in the case of *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279, the statute, Laws of 1893, page 196, § 22, places that duty upon the commissioners. Where the assessment is shown to have been a reasonably fair one, the commissioners' decision as to the extent of the property specially benefited ought not to be disturbed. The record before us satisfies us that a fair determination of that matter was made by the commissioners, and the judgment is therefore affirmed.

FULLERTON, RUDKIN, CROW, and DUNBAR, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 6973. Decided November 13, 1907.]

The State of Washington, *Appellant*, v. Charles Herald, *Respondent*.[1]

Constitutional Law—Privileges and Immunities—Sunday Closing of Theaters. Bal. Code, § 7250, providing a fine for keeping "open any play house or theater" on Sunday was intended to prevent the opening thereof for the purpose of giving plays or performances, and not to opening for the purpose of religious or other quiet, legitimate, and orderly exercises; and hence is not unconstitutional as an abridgment of the rights of individuals.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered March 30, 1907, upon sustaining a demurrer to an information charging defendant with the offense of keeping a theater open on Sunday. Reversed.

H. G. Rowland and *Robert M. Davis*, for appellant.

McBride, Stratton & Dalton and *Ellis & Fletcher*, for respondent.

Root, J.—Respondent was informed against by the prosecuting attorney of Pierce county by an information charging him with having violated Bal. Code, § 7250 (Pierce's Code, § 1886), which reads as follows:

"Any person who shall keep open any play house or theater, race ground, cock pit, or play at any game of chance for gain, or engage in any noisy amusements, or keep open any drinking or billiard saloon, or sell or dispose of any intoxicating liquors as a beverage, on the first day of the week, commonly called Sunday, shall, upon conviction thereof, be punished by a fine not less than thirty dollars nor more than two hundred and fifty dollars. All fines collected for violation of this section shall be paid into the common school fund."

A demurrer was interposed to the information, and sustained by the trial court, upon the ground that the statute was un-

[1]Reported in 92 Pac. 376.

constitutional as being in conflict with art. 1, § 12, of the state constitution, and § 1 of the fourteenth amendment to the Federal constitution.

It is urged by respondent that this statute prevents the opening of a theater building for any purpose whatever on Sunday; that the opening of such theater building for church, Sunday school, ordinary lecture, memorial service, or other legitimate, quiet, and proper service, would be invalid as much as if opened for the purposes of giving a theatrical play or dramatic performance; that the attempt to prevent such a building from being opened for such religious or other orderly and quiet exercises is an infringement of the rights of the individual, and is consequently in contravention of the constitutional guaranties above referred to.

The question depends upon the construction to be given the statute. If it be given a narrow, technical construction, respondent's position may be upheld. But if it be given, what we regard as a reasonable and common-sense interpretation, to wit, that a theater building or playhouse should not be opened for theatrical plays or dramatic performances upon Sunday, then it is not open to the objections urged. We think it is perfectly apparent that the legislature intended by this statute to prevent the opening of theaters and play houses on Sunday for the giving of such plays and performances, and that it had no intention of forbidding them to be opened for religious or other quiet, legitimate, and orderly exercises.

The judgment of the honorable superior court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

FULLERTON, RUDKIN, MOUNT, and DUNBAR, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 7011. Decided November 13, 1907.]

JAMES M. MOONEY, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

APPEAL—REVIEW—WAIVER OF ERROR. Error in refusing to grant a nonsuit is waived by proceeding with the trial.

CARRIERS—OF PASSENGERS—NEGLIGENCE OF MOTORMAN—CONTROL OF STREET CAR ON STEEP GRADE. It is gross negligence for a motorman, on a street car heavily loaded with passengers, after turning off the power and setting the brakes at the top of an eleven per cent grade, to leave the controller surrounded by passengers, allowing the car to descend without any guiding hand, and go so far from his post of duty that, when a passenger turned on the power and released the brakes, he could not return until the car had sped a distance of four or five blocks, there being no controlling necessity for such action.

APPEAL — REVIEW — HARMLESS ERROR — TRIAL. Error cannot be predicated on misconduct of counsel in a controversy over the law applicable to the case and the reading of a decision, where the decision was not read and no prejudice appears.

DAMAGES—INJURIES—EXCESSIVENESS. A verdict for $5,000 reduced by the trial court to $3,500, for injuries sustained by a barber, who, nine months after, was seriously crippled and unable to perform labor or follow his usual occupation, will not be set aside on appeal as excessive.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 7, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger through being thrown from a street car. Affirmed.

Sachs & Hale, for appellant.

Jackson Silbaugh, for respondent.

RUDKIN, J.—This was an action to recover damages for personal injuries. The following facts appear without substantial conflict or contradiction. The defendant owns and

[1]Reported in 92 Pac. 408.

operates a street car line between the city of Seattle and the town of Renton, a distance of about ten miles. The car line descends from Jackson street to Dearborn street, a distance of four blocks, at a grade of eleven per cent. At Dearborn street a switch turns the southbound cars to the right-hand track, as you go south, and from that point a double track is maintained. On the evening of July 2, 1906, the plaintiff became a passenger on one of defendant's outgoing cars. The seats were all filled and passengers were standing in the aisle and on the front and back platform, the car containing about ninety or one hundred passengers in all. The plaintiff occupied a standing position on the back platform near the car door. As the car passed Jackson street, the motorman set the brakes, turned off the power, and left his post at the controller to close a gate at the side of the car. While thus engaged, one of the passengers stepped up to the controller, released the brakes and turned on the power. As he did so, the car shot ahead and soon attained a speed of from twenty-five to thirty miles per hour, and as it rounded the curve onto the switch at Dearborn street, the plaintiff was hurled from the car and received injuries for which a recovery is sought in this action. From a judgment in his favor, the present appeal is prosecuted.

The first error assigned is the refusal of the court to grant a nonsuit. We have repeatedly held that such an error is waived by proceeding with the trial after the nonsuit is denied, and that this court will thereafter consider only the entire record.

The second assignment is the refusal of the court to give the following instruction:

"If you find from the evidence that when approaching the switch at Dearborn street the motorman shut off the power which was propelling the car and set the brakes, as was customary at such place, so that the car would under such condition have been running very slowly when reaching the switch, and that after shutting off the power and setting the

brake, as aforesaid, the motorman, in the exercise of his duty, stepped to the side of the platform for the purpose of closing the gate of said car, and that while so engaged a passenger on the car, acting without any authority from the defendant company, released the brake and turned on the power so that the car shot ahead down the inclined track, then I charge you that the accident complained of was the result of the wrongful act of such passenger and the defendant railway company cannot be held liable to the plaintiff for any injury received by him, and your verdict should be in favor of the defendant."

The court gave the instruction substantially as requested, with this addition or modification:

"And if you further find that the motorman, as soon as he observed that some one had turned on the power, used due diligence in getting control of the car, and that he in no manner contributed to said accident . . . ."

The instruction as thus modified is by no means free from ambiguity. From the first part of the charge one would infer that the court did not deem the motorman guilty of negligence for leaving his post of duty for the purpose of closing the gate, under the circumstances detailed in the charge; but what was intended by the further statement, "and that he in no manner contributed to the accident," is not entirely clear. Certainly the act of the motorman in leaving his post so that any passenger might release the brakes or turn on the power contributed to the accident, but in view of the first part of the charge, the court could have scarcely so intended. Perhaps the court intended only some affirmative action on the part of the motorman, contributing to the accident. But whether the instruction is susceptible of this construction we need not inquire. We think the charge in any aspect we may view it was more favorable to the appellant than the law would warrant. In our opinion, a motorman in charge of a car loaded with passengers, who sets his brakes, turns off his power, permits his car to descend an eleven per cent grade, without a guiding hand, leaves his controller surrounded by passengers, any one of whom may release the brakes or turn

on the power at will, and goes so far from his post of duty that he cannot return thereto until the car has sped a distance of four or five blocks, without some controlling necessity for such action on his part, is guilty of gross and inexcusable neglect; and the appellant could not be prejudiced by any charge the court might give on the question of its negligence.

The next error assigned is the refusal of the court to give an instruction defining proximate cause. By this instruction the appellant sought to distinguish between the acts of the motorman and the acts of the passenger who released the brakes and turned on the power, but what we have already said disposes of that question, as well as the refusal of the court to direct a judgment notwithstanding the verdict, which is the next error assigned.

The last error assigned is the refusal of the court to grant a new trial. On the hearing of this motion the court overruled the same, on condition that the respondent would remit $1,500 from the $5,000 verdict returned by the jury. The remission was made, and judgment rendered in favor of the respondent for $3,500.

The only questions raised by the motion not already disposed of are (1) misconduct of counsel, and (2) insufficiency of the evidence to justify the verdict. During the closing argument for the respondent, a controversy arose between counsel over reading a certain decision of this court to the jury, over the law applicable to the case, and over certain facts and the inferences to be drawn therefrom. The decision was not read to the jury and we fail to see wherein the appellant was prejudiced or injured in any of the matters complained of.

On the last question to be discussed we think the testimony was ample to sustain the verdict as reduced by the trial court. At the time of the trial, some nine months after the accident, the respondent was seriously crippled and unable to perform labor or follow his usual occupation, that of barbering. The jury, who heard the testimony and saw the respondent,

awarded him $5,000; the trial court, in the exercise of the discretion vested in it by law, reduced the amount of the recovery to $3,500, and there is nothing in the record to convince us that a further reduction should be made.

The judgment of the court below is accordingly affirmed.

HADLEY, C. J., DUNBAR, CROW, and FULLERTON, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 6783. Decided November 13, 1907.]

L. P. RANOUS *et al.*, *Respondents*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

CARRIERS — INJURIES — PASSENGERS ALIGHTING — ACCELERATION OF SPEED. A street railway company is liable for personal injuries sustained by a passenger, about to alight from a car, where it appears that she gave notice to stop at a certain street, that the conductor gave the motorman the signal to stop there, that as the car approached the street at a slow rate of speed she went to the back platform preparatory to alighting, and as the car reached the center of the street, its speed was suddenly accelerated, throwing the plaintiff into the street, it appearing that the sudden acceleration was not for the purpose of reaching the far crossing, as the car did not stop.

SAME—DANGERS IN ALIGHTING—KNOWLEDGE OF OPERATORS. The operators of a street car are bound to know that where a bell is sounded to stop at a certain street, passengers act thereon and may be in a place of danger preparatory to alighting.

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse instructions given in the general charge.

APPEAL—REVIEW—INVITED ERROR. Appellant cannot complain of error in sustaining an objection, where it forced respondent to make the objection and gained all it sought in the court below, since it thereby invited the ruling.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 17, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an

[1]Reported in 92 Pac. 382.

action for personal injuries sustained by a passenger alighting from a street car. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

Jackson Silbaugh and *Bard, Fenton & Gaffney*, for respondents.

RUDKIN, J.—This was an action to recover damages for personal injuries. The testimony on the part of the plaintiff tended to show the following facts: The defendant owns and operates a street railway system in the city of Seattle. On the 30th day of April, 1906, the plaintiff boarded a Madison street car at Broadway, for the purpose of being transported to Sixth avenue. At the time of paying her fare, or surrendering her transfer, she made known to the conductor in charge of the car her desire to alight from the car at Sixth avenue, and between Seventh and Eighth avenues she made a like request. As the car passed Seventh avenue the conductor sounded the bell, which is the customary signal for the car to stop at the next street, in this case, Sixth avenue. As the car approached Sixth avenue at a slow rate of speed, the plaintiff arose from her seat and proceeded to the back platform of the car, with the intention of alighting from the car when the same should come to a stop. As the car reached about the center of Sixth avenue its speed was suddenly accelerated, and the lurch caused by such acceleration threw the plaintiff from her position on the back platform of the car into the street, causing injury to her person, for which a recovery is sought in this action. From a judgment in favor of the plaintiff, the defendant has appealed.

The principal question raised by the appeal is that the evidence was insufficient to justify the verdict. The argument in support of this contention is based largely upon the following statement contained in the appellant's brief: "The court will take notice of the fact that the usual stopping place of a street car is upon the far side of the street. The car, when

its speed was accelerated, had not yet reached this point." While we know as a matter of fact that street cars usually stop at the far side of intersecting streets, we also know that there are exceptions to the rule. One exception is where the car is ascending or descending a steep grade. In such cases the cars stop on the level at the intersecting streets, which makes the stopping place for passengers the near instead of the far side of the street; and inasmuch as the testimony in this case shows that there is a steep decline on Madison street just after the car passes over the crossing on the lower side of Sixth avenue, it would seem that this case presents an exception to the general rule. But we do not at this time presume to take judicial notice of the usual stopping place of street cars, nor do we deem it material whether the stopping place of this particular car was at the far or near side of Sixth avenue; for it appears conclusively that the car did not in fact stop at Sixth avenue, and that the acceleration of the speed of the car on entering Sixth avenue was not for the purpose of reaching the stopping place on the opposite side of the street. The argument of the appellant is therefore based largely on a misapprehension of the facts disclosed by the record. Counsel cite the case of *Etson v. Fort Wayne etc. R. Co.*, 110 Mich. 494, 68 N. W. 298, in support of their contention; also *Philips v. St. Charles Street R. Co.*, 106 La. 592, 51 South. 135. In the former case the court said:

"The car was not at a proper place to stop, but had nearly stopped. To propel it to the usual stopping place beyond the second walk (if such was the regulation), the application of power or the removal of the brake was necessary—possibly both. It is a natural law that inertia is not instantly overcome, and that a start or accelerated motion tends to throw down one riding upon a car. We cannot say that it was negligent for the plaintiff to step upon the platform at the time he did, because it is a daily occurrence and the usual practice for people to do so; but on the other hand, if it were not negligence for him to be there when the car was in motion, it is difficult to see how it could be negligence on the part of the

company to run its cars to the usual stopping place although he was upon the platform. The car had a guard in the rear and a handle on the edge, and ordinarily a person is reasonably safe when upon the platform. At all events, it would be unjust to hold that by venturing upon the platform when the car was in motion the passenger can impose upon the company the obligation of instantly stopping or not accelerating the motion of the car."

Two of the judges specially concur upon the ground;

"That the starting of the car, which it is claimed caused the plaintiff to fall from the platform, was not improper and was not negligent under the circumstances. The car had not yet reached its stopping place at the time the plaintiff took his position on the platform, and the mere acceleration of the speed of the car by applying electricity when it was discovered to be necessary in order to reach the usual stopping place before the car should come to a full stop, was not, in my judgment, negligence."

In the latter:

"From the whole case as presented, we conclude that the plaintiff left his seat whilst the car was in motion, and took a position upon the lower step of the platform preparatory to alighting when the car should reach the crossing. It may be that the motorneer had slightly miscalculated and that it became necessary just then to accelerate the motion of the car in order that the rear platform might be exactly over the crossing when the car should stop and that the plaintiff, resting possibly on one foot, was taken by surprise by the forward movement and lost his balance; but slight irregularities of movement are common incidents in the starting and stopping of street cars, and those who prepare to alight, and do alight whilst the cars are in motion, assume the risk resulting from such irregularities."

These cases and others that might be cited established the following propositions:

(1) That a street car passenger, who leaves his seat when the car is approaching his destination and goes to the platform for the purpose of alighting when the car comes to a stop, is not, as a matter of law, guilty of contributory negli-

gence. *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474, 37 Atl. 132; *Weir v. Seattle Elec. Co.*, 41 Wash. 657, 84 Pac. 597.

(2) That a street railway company is not liable to such a passenger for injuries resulting from the ordinary jolting or jerking of the car, or the acceleration of its speed for the purpose of reaching its usual stopping place.

This case, however, presents a different question. Here the respondent was not injured by the ordinary jerking or jolting of the car in reaching its usual stopping place, nor by the acceleration of its speed for that purpose. As said by this court in *Weir v. Seattle Elec. Co., supra,*

"The negligence on the part of the respondent consisted in this: The servants in charge of the car led the appellant into a place of more or less danger and threw him off his guard. In other words, the appellant had a right to presume that the car would come to a stop at the north side of Virginia street, and to act upon that presumption. The jury might infer from this testimony that the failure to stop the car in obedience to the signal was the direct and proximate cause of the appellant's injury. It cannot be said, as a matter of law, that the appellant was guilty of contributory negligence. Indeed, the respondent does not so contend. It cannot be said that the appellant assumed the extra hazard arising from the failure of the respondent to stop the car, as it was in duty bound to do, nor in our opinion can it be said, as a matter of law, that the respondent was entirely free from negligence which contributed approximately to the injury. As above stated, we have thus far assumed that the appellant's testimony is true. Of course, if the signal to stop the car was not given until after the car passed beyond Virginia street, or if the appellant voluntarily stepped or jumped from the car, or was otherwise guilty of contributory negligence, he cannot recover."

The rule there announced is not in conflict with cases cited by the appellant, and is supported by authority. *Scott v. Bergen County Traction Co.*, 63 N. J. L. 407, 43 Atl. 1060; *Consolidated Traction Co. v. Thalheimer, supra.*

It is further said that the conductor and motormen did not know that the respondent was on the platform or in a place of danger. But if the bell was sounded to stop the car at Sixth avenue, as the respondents contend, the operators in charge of the car were bound to know that passengers might, and constantly do, act upon the warning thus given.

The next error assigned is the refusal of the court to give certain instructions requested by the appellant. The instructions requested were free from objection, but an examination of the charge as given, shows that the court below gave the requested instruction in substance and fully safeguarded all the rights of the appellant.

The next error assigned is the ruling of the court in sustaining an objection to the testimony of the physician who attended the respondent for the first few days after her injury. An examination of the record convinces us that the appellant gained its point, and attained all it sought in the court below, when it forced the respondent to object to the competency of the witness. The ruling of the court in sustaining the objection was invited rather than opposed, and will not be reviewed here.

Finding no error in the record the judgment is affirmed.

MOUNT, FULLERTON, DUNBAR, and ROOT, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 6827. Decided November 14, 1907.]

THOMAS JONES, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

APPEAL—HARMLESS ERROR—TRIAL—CONDUCT OF COUNSEL. The remarks of plaintiff's counsel in calling the attention of the jury to the cause of the accident (which was not in issue) is harmless where it was conceded that the accident was due to defendant's negligence, and the court instructed the jury to disregard such remarks.

DAMAGES—EXCESSIVE VERDICT. A verdict will not be set aside as excessive when it does not appear to have been the result of passion or prejudice.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 2, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in a street car collision. Affirmed.

Sachs & Hale, for appellant.

Jackson Silbaugh, for respondent.

PER CURIAM.—This is an action brought for damages as the result of a head-on collision between the cars of appellant, on the 13th day of August, 1906. The complaint alleged negligence on the part of the servants of the appellant, the injuries to himself by being thrown with great violence, whereby he had received severe injuries to his side, back, knee and right arm; and alleged that some of his teeth were knocked loose, and that he received injuries about the face and hands; that the spinal cord was affected by reason of said injuries; and alleged various other injuries; and alleged damages in the sum of $5,000. Upon the trial of the cause, the jury returned a verdict in the sum of $3,000. Judgment was entered upon such verdict, and appeal followed.

[1]Reported in 92 Pac. 379.

The first four assignments of error relate to instructions given and refused. The law involved in these assignments has been examined and decided by this court at the present term in the cases of *Jordan v. Seattle, Renton etc. R. Co.*, *ante* p. 503, 92 Pac. 284, and *Connell v. Seattle, Renton etc. R. Co.*, *ante* p. 510, 92 Pac. 377, the appellant in said actions being the appellant in this action. All of said suits grew out of the same accident. In those cases this court refused to sustain appellant's contention, and it would be idle to again enter into a discussion of the propositions therein involved. So that there is nothing left in this case but the alleged misconduct of respondent's attorney during the trial, and the contention that the verdict is excessive.

Concerning the first contention, even conceding the misconduct of the attorney in calling the jury's attention to the probable cause of the accident, which the court had ruled was not within the issues, upon objection made by appellant's attorney, the court promptly directed the jury that it should not consider or be governed by such suggestions. In addition, the accident was a head-on collision, and the whole testimony shows that the jury could not have come to any other conclusion than that the appellant was negligent. Hence, the remarks of the counsel were obviously harmless.

From a careful investigation of all the testimony, we are not satisfied that the verdict rendered by the jury was the result of passion or prejudice.

The judgment is affirmed.

[No. 6950. Decided November 14, 1907.]

THE CITY OF SEATTLE, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Appellants*.[1]

LIMITATION OF ACTIONS—CONTRACT OR TORT—INDEMNITY—LIABILITY OVER UNDER FRANCHISES. Where street railway franchises contained conditions whereby the company agreed to keep certain portions of streets in repair, and to save the city harmless from the payment of damages growing out of or in any way connected with the franchises, an action by the city to recover over the amount of a judgment for damages caused by defects in the streets is not based upon the common law liability making the city and the company joint tort feasors; and such action, therefore, will not be barred by the statute of limitations in two years, but the six-year or three-year limitation for actions on contract applies.

SAME—ACTUAL RIGHT OF ACTION—INDEMNITY—JUDGMENT—EFFECT OF APPEAL. Where a city is indemnified by provisions of a franchise from damages for defects in certain portions of the street, the statute of limitations does not begin to run upon recovery of a judgment for damages against the city, where the cause was appealed, but only from the date of the affirmance of the judgment in the supreme court, or perhaps from the date of its payment by the city.

JUDGMENT—RES JUDICATA—PERSONS AND MATTERS CONCLUDED—INDEMNITY. A street railway company, which had agreed to keep a portion of a street in repair and save the city harmless from damages by reason of defects, is not bound by a judgment against the city by reason of actual knowledge of the suit, where it received no notice or opportunity to defend; and in an action to recover over from the company the amount of the judgment it is error to exclude evidence on the part of the defendant that the defect was not in a public street.

SAME—DUTY TO APPEAR AND DEFEND—PLEADING—JUDGMENT—BAR—ESTOPPEL—ACTION OVER—DEFENSES. Where a street railway company, liable over to a city for damages sustained by reason of defects in portions of a street was given notice to appear and defend the action, and refused to do so, but gave notice to the city of a judgment of dismissal rendered in its favor in an action brought against it by the same plaintiff for the same injuries, and requested the city to plead the judgment in bar, and offered to produce evi-

[1]Reported in 92 Pac. 411.

dence to sustain the plea, it is the duty of the city to make such plea, and its failure to do so is a valid defense to any action to recover over from the company.

FULLERTON, J., dissenting.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 9, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon a contract of indemnity. Reversed.

Carroll B. Graves, for appellant Northern Pacific Railway Company.

Samuel H. Piles, *James B. Howe*, and *Charles H. Farrell*, for appellant Columbia & Puget Sound Railroad Company.

Scott Calhoun and *Elmer E. Todd*, for respondent.

ROOT, J.—This is an action by the respondent against appellants for an alleged breach of conditions contained in certain franchise ordinances, wherein appellants agreed to keep certain portions of Railroad avenue in the city of Seattle planked and in repair, and to save the city harmless from the payment of any and all damages growing out of, or in any way connected with, the rights, privileges, or franchises granted by said ordinances. The facts out of which the litigation arose are about these: In September, 1900, one Edwin Eskildsen, a boy four years of age, while walking along Railroad avenue, caught his foot in a small hole in the planking near one of the Northern Pacific Railway Company's tracks, and his leg was run over and cut off by a passing train. Through his guardian he instituted an action in the circuit court of the United States for the district of Washington, against the Northern Pacific Railway Company to recover damages for the injury mentioned. The cause came on for trial before the court and a jury, and a verdict was returned in favor of the defendant, and on March 4, 1901,

a judgment was entered upon such verdict. No appeal was prosecuted therefrom, and the judgment became final.

Thereafter in March, 1901, said minor, through the same guardian, began an action in the superior court of King county, Washington, against the city of Seattle, to recover damages arising from the identical accident and injury charged in the other action, and alleging the said injury to have occurred in a public street through the negligence of said city. A verdict was returned against the city, and thereupon judgment was entered in favor of said minor, on September 28, 1901. From this judgment an appeal was taken to the supreme court of the state, which on October 13, 1902, affirmed said judgment. *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64.

The present action was commenced on October 10, 1905. The appellant the Northern Pacific Railway Company made an answer denying that the accident to Eskildsen occurred in a public street, but alleged that it occurred upon the grounds owned and occupied by the railway company. It also pleaded the statute of limitations and that, if liable at all for the accident, it was as a joint tort feasor with the city, and consequently not liable over to it. It further sets forth, as an affirmative defense, the suit against it and the judgment in its favor in the United States circuit court; that when it was called upon by the city to defend the action of Eskildsen against the city, it declined to do so, but informed the city of the action by Eskildsen against it in the Federal court, and asked the city to plead and interpose the same as a defense, and offered to furnish the evidence to establish such defense. To this last-mentioned affirmative defense, the city interposed a demurrer which was by by the trial court sustained, and this action is assigned as error.

The appellant the Columbia & Puget Sound Railroad Company answered the complaint of respondent, denying most of the material allegations, and denying that it was called upon

at the time of the former trial to defend the action of Eskildsen against the city, although admitting that it had knowledge of the pendency of said action. It also pleaded the statute of limitations. Upon the trial of the case, the court refused to permit appellants to introduce any evidence to show that the accident did not occur in a public street, and this is assigned as error. The cause was tried before a judge without a jury, findings and conclusions made and filed in favor of respondent, and a judgment entered thereupon for the full amount of the judgment of Eskildsen against the city, together with costs and interest.

As to the statute of limitations, respondent contends that the obligation arose from a written instrument, and that the action could be brought at any time within six years from the time it accrued. Appellants claim that the action is founded, not upon a direct liability of appellants, but upon an instrument creating only a collateral security in favor of the city; that it was in effect upon a contract express or implied, and not in writing nor arising out of any written instrument; and it is contended that the action accrued when the judgment of Eskildsen against the city was entered on September 28, 1901, instead of October 13, 1902, when the judgment was affirmed by the supreme court. It also suggested that the ordinance does not have reference to personal injuries occasioned by defective planking, and that the only liability is the common law obligation to answer over, and that this would fall within the two-year limitation of the statute. We do not think this latter contention can be upheld. Doubtless the three or the six-year limitation applies, and assuming but not deciding that it be the three-year limitation, we think the action was brought in time, for the reason that the period should be measured from the date of the affirmance of the judgment by the supreme court, or perhaps from the date of payment of the judgment by the city, rather than from the time of the original entry of judgment in the superior court.

Both of the appellants urge that they should have been permitted to show that this accident did not occur in a public street, but on the property of the Northern Pacific Railway Company. It seems to us that this contention must be sustained. The ordinances in question imposed the obligation upon the railway companies of holding the city harmless on account of anything that might happen in the streets of the city by reason of their occupation and use by such railway companies. It would seem to be clear that the city could not be responsible for such an injury as this boy sustained, if the happening thereof occurred not upon the street but upon the private lands of the railway company. It is urged, however, that the Eskildsen judgment against the city is conclusive against these appellants upon this question, and that they cannot be heard to say that the accident did not occur in a public street. We think this position is not tenable. The Columbia & Puget Sound Railroad is not by the trial court found to have received notice or opportunity to defend in that action, although it is found that it knew about the pendency of the action. There may be certain classes of actions wherein actual notice may bind a party holden to answer over. But we do not think that rule is applicable to a case of this kind. In order for this railway company to have been bound by the judgment in the *Eskildsen* case against the city, it should have been asked and afforded an opportunity to defend the action. Such not having been done, the judgment was not conclusive against it.

The Northern Pacific Railway Company pleaded affirmatively the judgment which it obtained against Eskildsen in the Federal court, and urges that the sustaining of the demurrer to this defense by the superior court was error, for the reason that the grounds which are now urged against it as a basis of liability to the city are the identical grounds which were alleged against it by Eskildsen in the case in the Federal court, and upon which the trial was there had, result-

ing in its favor. We think this position is well taken. The city is here seeking to recover against this railway company because of the negligent manner in which it maintained the planking along its track where Eskildsen was injured, and which it alleges was the cause of his injury. To recover herein and as the foundation for its recovery, it was incumbent upon the city to show that Eskildsen was injured as a result of such negligence on the part of the railway company. This identical question having been by a court of competent jurisdiction determined in favor of the company in a case wherein Eskildsen was a party, it is evident that had the city interposed that judgment in the action against it by Eskildsen, it must have been a complete defense in so far as any negligence of this railway company was concerned. Had it been interposed, Eskildsen could not have recovered any judgment against the city by reason of any negligence of such railway company. The company having notified the city, after the commencement of such action and before it came to trial, of the litigation and judgment in the Federal court, and offered to produce evidence to establish said facts, and requested the city to plead such judgment, we think that by refusing to so do, the city cannot now be permitted to recover against said appellant. The demurrer to this affirmative defense should have been overruled. The evidence offered by appellants, to show that the accident occurred upon the lands of one or both of the appellants and not within the limits of any public street, should have been admitted.

On account of these errors, the judgment of the honorable superior court is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

HADLEY, C. J., RUDKIN, CROW, and MOUNT, JJ., concur.

FULLERTON, J., dissents.

[No. 6958. Decided November 14, 1907.]

P. J. PARKER, *Appellant*, v. J. F. MURPHY, *Respondent*.[1]

FALSE IMPRISONMENT—ACTION FOR DAMAGES—EVIDENCE—SUFFICIENCY. In an action for damages for false imprisonment a verdict is properly directed for the defendant, where it appears from plaintiff's testimony that his conduct laid himself open to the arrest complained of, and the evidence fails to show that plaintiff instigated the arrest itself or had knowledge thereof, but had only asked for police protection.

Appeal from a judgment of the superior court for Pierce county, Black, J., entered January 25, 1907, upon the verdict of a jury rendered by direction of the court in favor of the defendant, in an action for false imprisonment. Affirmed.

J. W. A. Nichols, for appellant.

Boyle, Warburton, Quick & Brockway, for respondent.

DUNBAR, J.—This was an action for false imprisonment. The complaint alleged that, on the 29th day of September, 1906, at Tacoma, Washington, defendant unlawfully directed and caused this plaintiff to be arrested, held and imprisoned, kept and detained, and restrained of his liberty, without any reasonable or probable cause, or any cause whatever, against the will and consent of plaintiff, for the space of three days, to plaintiff's damage, etc.

The answer denied the affirmative allegations of the complaint; alleged that, at the time of the alleged false imprisonment, the plaintiff was working for the defendant as a clerk in a store in Tacoma, and that on the 29th day of September, 1906, he discharged the plaintiff from his employment; and that the plaintiff thereupon, and for the purpose of annoying and harassing the defendant, in the presence of clerks and customers, became loud and boisterous in his de-

[1]Reported in 92 Pac. 371.

mands for immediate payment; and after going out of said store, returned after a short interval, and during the entire day until the evening thereof would return at short intervals repeating in a loud and boisterous manner his demands for immediate payment, and using toward defendant loud language, creating in each instance a disturbance in said store and disturbing the peace and quiet of the city of Tacoma, against the ordinances of the city of Tacoma in regard to the disturbance of the peace; that after defendant had repeatedly requested plaintiff to depart from his store and remain away, and had warned him that, if he persisted in his boisterous conduct he would have to remove him from the store, and that after the plaintiff, notwithstanding said request, persisted in said boisterous conduct, the defendant requested the police authorities of the city of Tacoma to come to the store of the defendant and remove the plaintiff from said store; and alleges that two of the police authorities of the city of Tacoma did come in obedience to such request and did remove the plaintiff from the store of the defendant; denies that he instructed the officers to cause any arrest of said plaintiff, or that said plaintiff was arrested at the instance or request of this defendant; but alleges that he is informed and believes that, after the plaintiff was removed from the store of the defendant by the said police officers, in the presence of said police officers, the plaintiff made threats towards and against the defendant and again returned to the store, and thereupon said officers did take said plaintiff into custody without the defendant's knowledge; but that the defendant was not aware until a long time afterwards that said arrest was in fact made, and had no knowledge in regard to his arrest and detention; denies that the plaintiff was held and imprisoned, restrained of his liberty, etc.

Upon the close of plaintiff's testimony, which consisted exclusively of the testimony of the plaintiff, the court, in response to a motion to direct the jury to bring in a verdict

for the defendant on the ground that the plaintiff had failed to establish a case by any evidence at all, did so instruct the jury. A verdict was rendered in accordance with such instruction, and judgment was entered in favor of the defendant and against plaintiff for the costs of the action. From this judgment, this appeal is taken.

From a reading of the testimony in this case, which is brief, it is difficult to see how any other disposition could have been made of the case than that which was made by the trial court, for the testimony of the plaintiff conclusively proves the truth of the allegations made in the answer. The plaintiff, upon his discharge and upon the refusal of the defendant to immediately pay him what was due him for services, immediately became persistent, boisterous, and insulting; and whatever may have been his civil rights in relation to the immediate collection of his debt, the defendant having postponed the payment of it until ten o'clock that evening, his own testimony showed that he was actuated by a desire to harass and insult the defendant rather than to collect the money which was due him.

The testimony also absolutely fails to show that he was arrested at the instance or request of the defendant. Upon plaintiff persisting in his boisterous and insulting conduct, the defendant, as he had a right to do, asked the police for protection, and that plaintiff be removed from his store. Having done this, there is no testimony tending to show that the defendant interested himself further in the matter, but it does show that after the officers had put the plaintiff out of the store, he again returned and resumed his boisterous conduct, and that the police on their own motion arrested him and took him to the city hall where he gave security for his appearance the next Monday morning. And this arrest was not made until after the officers had informed him that he would be arrested if he returned and resumed his boisterous conduct.

There seems to be an absolute failure of testimony to sub-

stantiate the allegations of the complaint, and the judgment will therefore be affirmed.

MOUNT, FULLERTON, RUDKIN, and ROOT, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 6816. Decided November 15, 1907.]

THE STATE OF WASHINGTON, *Appellant*, v. ELIZABETH FENN, *Respondent*.[1]

MARRIAGE—VALIDITY—PLACE OF CONTRACT—DIVORCE—RIGHT TO REMARRY—STATUTES—EXTRA-TERRITORIAL FORCE. Laws 1893, p. 225, prohibiting divorced parties from remarrying within six months after the decree, either within or without the state, renders a remarriage during such period void, if contracted in this state, or if contracted in a foreign country by persons domiciled in this state with the purpose of evading the laws of this state; but if the parties were, at the time of the remarriage, domiciled in the foreign country, the marriage would be valid here if valid in such country; our statute having no extra-territorial force as to marriage by nonresidents.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered March 16, 1907, upon sustaining a demurrer to the information, dismissing a prosecution for the crime of bigamy. Reversed.

H. G. Rowland, Robert M. Davis, and *H. G. Fitch*, for appellant.

Edward E. Cushman and *Daniel Landon*, for respondent.

RUDKIN, J.—An information was filed against the defendant in the court below accusing her of the crime of bigamy. A demurrer to the information was sustained, and the state refusing to plead further, judgment of dismissal was entered, from which the present appeal is prosecuted.

[1]Reported in 92 Pac. 417.

The information is in the usual form in such cases and charges a crime, unless it contains matter which if true would constitute a defense to the action. The matter set forth in the information and relied on as a defense is this: the respondent was lawfully divorced from one Edward Hodges, her then husband, by the superior court of King county, in this state, in the month of February, 1901. Within ten days after obtaining such divorce, she married one Joseph Clark in Victoria, B. C., and continued to cohabit with him until the month of January, 1907, such marriage being valid according to the laws of British Columbia where contracted. The alleged bigamous marriage was contracted in Pierce county in this state on the 16th day of January, 1907, with one Arthur Fenn. If the Victoria marriage was valid in this state the information charges a crime; but if invalid, the respondent had no husband living at the time of the Fenn marriage and the judgment should be affirmed. The question thus presented calls for a construction of § 1 of the act of March 9th, 1893, Laws 1893, p. 225, which reads as follows:

"Section 1. Whenever a judgment or decree of divorce from the bonds of matrimony is granted by the courts in this state, neither party thereto shall be capable of contracting marriage with a third person until the period in which an appeal may be taken has expired; and in case an appeal is taken then neither party shall intermarry with a third person until the cause has been fully determined; and it shall be unlawful for any divorced person to intermarry with any third person within six months from the date of the entry of the judgment or decree granting the divorce, or in case an appeal is taken it shall be unlawful to contract such marriage until judgment be rendered on said appeal in the supreme court. All marriages contracted in violation of the provisions of this section, whether contracted within or without this state, shall be void."

In support of its appeal the state relies upon the two general propositions that a marriage, valid where contracted, is valid everywhere, and that statutes declaring a second marriage unlawful, pending the time for appeal from divorce proceedings

and imposing a penalty for their violation, are penal in their nature and have no extraterritorial effect.

The general doctrine that a marriage valid where contracted is valid everywhere, has so often been declared by the courts and reiterated by text writers that it has become a maxim of the law. But there are exceptions to the rule as well established as the rule itself, viz.: (1) incestuous and polygamous marriages prohibited by natural law; and (2) marriages prohibited by positive law. The Victoria marriage now under consideration may fall within the second exception. *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145, 79 Am. St. 923; *Putnam v. Putnam*, 8 Pick. 433; *People v. Chase*, 28 Hun. 310; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189, and other cases, cited by the appellant, to the effect that statutes declaring in general terms that certain marriages contracted in violation of their provisions shall be void have no extraterritorial effect, have no application here. The decisions were all based on the general language of the acts under consideration, the courts holding that it did not appear that the respective legislatures intended that the acts should apply to marriages contracted without the state. The statute of this state, however, admits of no such construction. It declares in direct and positive terms that all marriages contracted in violation of its provisions, "whether contracted within or without this state shall be void."

The power of the state to declare void marriages contracted beyond its borders, at least where such marriages are contracted by its own citizens in violation of its laws, cannot be denied. Thus in *Kinney v. Commonwealth*, 30 Gratt. 858, a negro man and a white woman, domiciled in Virginia, went to the District of Columbia, and were there regularly married. About ten days thereafter they returned to Virginia, and were prosecuted for lewd and lascivious cohabitation. The Court of Appeals of that state ruled that the marriage in the District of Columbia was a mere evasion of the laws of the Com-

monwealth prohibiting such marriages, and could not be pleaded in bar of the prosecution, though the marriage was confessedly valid in the District of Columbia where contracted. In *Williams v. Oates*, 27 N. C. 535, it was held that a marriage contracted in South Carolina by a citizen of North Carolina, in violation of the statute of North Carolina, forbidding the guilty party to a divorce proceeding to marry again, was void in North Carolina, though valid in South Carolina where contracted. To the same effect see *Pennegar v. State*, 87 Tenn., 244, 10 S. W. 305. In *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683, it was held that a marriage between a negro man and a white woman, domiciled in North Carolina, but contracted in South Carolina in violation of the laws of North Carolina, was void in North Carolina, though valid in South Carolina. On the other hand, the same court held in *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678, that a marriage contracted between a negro and white person in South Carolina where lawful, both parties being domiciled there, was valid in North Carolina. In *State v. Tutty*, 41 Fed. 753, it was held that a marriage between a white person and a negro, domiciled in Georgia, is utterly void under the Georgia statute, though valid in the District of Columbia where contracted. In *Brook v. Brook*, 9 H. L. Cas. *193, it was held that the marriage of British subjects in Denmark is invalid in England, if prohibited by British law, though the marriage was valid according to the laws of Denmark.

It will thus be seen that a state law regulating marriage may and does have an extraterritorial effect when the legislature so intends, at least where the parties to the marriage have their domicile within the state; and there is no escape from the conclusion that our legislature intended that all marriages contracted within the state, and all marriages contracted without the state by persons domiciled here, for the purpose of evading our laws, should be null and void. The statute is undoubtedly broad enough to include all marriages contracted within the time specified, regardless of the place where con-

tracted and regardless of the domicile of the parties, but we do not think that such was the legislative intent. If the statute should be construed to avoid marriages contracted in other states by citizens of other states who never owed allegiance to our laws, it is the most drastic piece of legislation to be found on the statute books of any of our states. As we have shown, the general rule is that the validity of a marriage is determined by reference to the law of the place where contracted. An exception to the general rule is sometimes made in favor of the law of the domicile of the parties. But a statute declaring marriages void, regardless of where contracted and regardless of the domicile of the parties, would be an anomaly and so far reaching in its consequences that a court would feel constrained to limit its operation, if any other construction were permissible.

We are satisfied that the prohibition in question was directed solely against marriages within the state, or by persons domiciled within the state, but contracted in other states for the purpose of evading our laws, and that no other persons or marriages are included or contemplated. Within the above rule, the information before us does not contain matter which constitutes a defense, for it does not appear that the Victoria marriage was void. If the parties to the Victoria marriage had their domicile in this state at the time the marriage was contracted, and went to Victoria for the purpose of evading our laws and thereafter returning to this state, such marriage was null and void, and, much as we regret it, the prosecution must fail. If, on the other hand, the parties to the Victoria marriage were domiciled there at the time the marriage was contracted, such marriage does not fall within the prohibition of our statute and is valid.

The judgment of the court below is therefore reversed, with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

MOUNT, ROOT, DUNBAR, and FULLERTON, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 6886. Decided November 15, 1907.]

BRONX INVESTMENT COMPANY, *Respondent*, v. NATIONAL BANK OF COMMERCE OF SEATTLE, *Appellant*.[1]

FRAUDS, STATUTE OF—SALE OF LAND—MEMORANDUM. Letters from the duly authorized agent of the vendors, containing the names of the parties, description of the property and conditions and terms of the sale, are a sufficient memorandum to satisfy the requirements of the statute of frauds.

ESCROWS—DEFINITION—INTENTION—DEEDS—DELIVERY — PRINCIPAL AND AGENT. Where nonresident vendors, living at a great distance from this state, agreed to all the terms and conditions of sale, whereby their deed was delivered to a local bank to be by it delivered upon the payment of the price and performance of certain conditions, reserving no control over the papers if the conditions were complied with, and one of the vendors testified that they intended to reserve no control, the transaction amounts to a delivery of the deed in escrow, and not a mere agency.

SAME—DEATH OF GRANTOR. The death of one of the grantors in a deed delivered in escrow does not affect the right of the grantee to delivery upon compliance with the conditions of the escrow agreement.

SAME—ACTIONS—PARTIES DEFENDANT. Where a deed has been delivered in escrow, the remedy of the vendee, upon a refusal to deliver the deed, is against the escrow holder, and there is no defect of parties defendant by reason of failure to join the vendors.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 5, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to compel the delivery of a deed. Affirmed.

Frank C. Park, for appellant.

Kerr & McCord and *Horace A. Wilson*, for respondent.

RUDKIN, J.—This was an action prosecuted by the Bronx Investment Company against the National Bank of Commerce of Seattle, to compel the delivery of a deed pursuant to

[1]Reported in 92 Pac. 380.

the terms of an escrow agreement theretofore entered into between the plaintiff and the grantors named in the deed. The court below found, in substance, that on or about the 21st day of July, 1906, Randolph S. Williamson and Marion V. Shippen, the then owners of lots 4, 5 and 8, of Block 136, of A. A. Denny's Broadway Addition to the City of Seattle, agreed in writing to convey the same to the Bronx Investment Company for the sum of $39,000 net to the owners, the purchase price to be paid and secured as follows: $19,000 in cash, and $20,000 on time, evidenced by two promissory notes of $10,000 each, due two years after date, with interest at the rate of six per cent per annum, and secured by mortgage on the property conveyed; that thereafter Williamson and Shippen agreed with the plaintiff that they would execute a good and sufficient deed of conveyance to the property, and that such deed should be delivered to the defendant bank, to be held in escrow by the bank, and delivered to the plaintiff, upon the payment of $19,000 in cash and the delivery to the bank of the promissory notes and mortgage above described; that, pursuant to this latter agreement, the deed was duly executed and delivered to the defendant bank; that the plaintiff has tendered to the bank the cash payment and the notes and mortgage as provided in the escrow agreement, and that the defendant bank has refused to accept the tender or deliver the deed to the plaintiff. On these findings a decree was entered in accordance with the prayer of the complaint, and the defendant has appealed therefrom.

In support of its appeal the appellant contends: (1) that it was incumbent on the respondent to prove a valid enforceable contract for the conveyance of the property, independent of the escrow agreement, and that it failed in this; (2) that there was no escrow agreement, or delivery in escrow; and (3) that there was a defect of parties defendant.

For the purposes of this appeal, we will assume that it was incumbent on the respondent to prove a valid subsisting con-

tract for the sale of the property, independent of the escrow agreement; but we think the evidence fully sustains the findings of the court in this regard. All negotiations leading up to the sale were conducted through Joseph Shippen, husband of one of the vendors and brother-in-law to the other, on the one side, and W. W. Hay on the other. The testimony shows conclusively that Joseph Shippen was the duly authorized agent of the vendors, and that they fully ratified and confirmed all his acts in the premises. It would seem also that W. W. Hay represented the vendors, in a measure at least; but whether he was their agent, the agent of the purchaser, the agent of both parties, or a mere go-between, we do not deem it material to inquire; for in either case, the letters from Joseph Shippen to W. W. Hay, in whatever capacity the latter may have acted, and the letters from Joseph Shippen to the bank, whether as agent of the vendors or escrow holder, fully satisfied the requirements of the statute of frauds. They contained all the essential elements of a valid contract; the names of the parties, the description of the property, the consideration, and all the terms and conditions of the sale.

"A letter may be a sufficient memorandum, and so may a telegram; and several letters and telegrams relating to the subject-matter of the contract may constitute a sufficient memorandum. The memorandum is adequate; although the letter or telegram is addressed to the writer's agent, or to a third person." 20 Cyc. 254.

In *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. 800, the court said:

"The letters passing between Mr. Bacon, the agent, and Mr. Cherry, the vendor, refer to and connect with each other, and contain all the terms of the sale and a sufficient description of the property. These letters of the vendor to his agent, stating a proposal of sale, and affirming the sale made by his agent on the terms named by himself, are a sufficient memorandum under the statute of frauds: . . . The party to be charged therewith under the statute is the vendor; and if the agreement be signed by him, or there be a

sufficient memorandum of an oral agreement signed by him, he will be bound; for an offer or proposal signed by the party proposing to sell will support an action against him for breach of the contract afterwards made by the oral acceptance of the offer by him to whom it was made, the fact of such acceptance being provable by oral evidence. . . ."

In *Singleton v. Hill*, 91 Wis. 51, 64 N. W. 588, 51 Am. St. 868, the court said:

"It is not necessary that the memorandum should be formal, or in one writing or paper, or made directly between the parties to the contract. The point raised by the learned counsel for appellants that the letters were mere communications between Hill and his agent is not material, for it is sufficient if the memorandum consists of letters passing between the vendor and third person, who is agent for the parties or one of them . . ."

Was there an escrow agreement?

"An escrow is a written instrument, which by its terms imports a legal obligation, deposited by the grantor, promisor, or obligor, or his agent with a stranger or third person, that is, a person not a party to the instrument, such as the grantee, promisee, or obligee, to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to take effect." 16 Cyc. 561.

"By some of the old authorities it is said that it is necessary that the form of the words used in the deposit of an instrument must be 'apt and proper.' If this ever was necessary, it is absolutely certain that it is not required now. The term 'escrow' need never be used; nor on the other hand will the use of the term necessarily make the instrument an escrow, although it evinces more clearly and distinctly than any other the actual intention of the parties. It need not be in writing. In fact no particular form of words is necessary, but the terms of the escrow stipulations are to be derived from all the circumstances." 16 Cyc. 564.

"Whether an instrument placed with a third person is to be an escrow or a completedly executed instrument depends upon the intention of the parties. If the evidence leaves any doubt upon the subject, the intention of the parties must be

determined by the jury upon the whole evidence. A declaration by the depositor that he delivers the instrument as his deed, or that 'he delivers [deposits] it as an escrow' is not conclusive, but is a mere matter of evidence to be weighed in connection with other circumstances of the case, in order to determine the real character of the transaction." 16 Cyc. 568.

We accept the foregoing as a correct statement of the law applicable to agreements of this kind.

In his letter of July 5, 1906, to Mr. Hay, Joseph Shippen, the agent, suggested the following program for the consummation of the sale:

"That the owners execute and acknowledge a warranty deed . . . to the purchasers you name; said executed deed to be intrusted to the cashier of the Washington National Bank at Seattle for delivery. 3. That on passing title you deliver to the bank: a. Cash, $19,000. b. Notes, two for $10,000 each at two years at 8 per cent interest. c. Mortgage made by purchaser to secure the notes. This I will draw and send you. d. Insurance policies as above stated. e. The abstract of title to accompany the mortgage. 4. Thereupon the bank will deliver the deed."

The program thus outlined was thereafter modified by reducing the rate of interest on the deferred payments to 6 per cent per annum, but in no other particular, and was submitted and assented to by the purchaser. In his letter to the cashier of the appellant bank the same agent wrote:

". . . Upon receipt of the deed please hold it in safekeeping for delivery to W. W. Hay, Esq., only after: (1) Payment to you of $19,000 in cash; (2) delivery to you of two notes and mortgage I have sent to Mr. Hay for execution by his company, which are marked by me o. k. with my signature in corner for identification—together with certified copy of board's resolution; (3) delivery to you of the Osborne abstract to accompany the mortgage; (4) delivery to you of a memorandum release as enclosed signed by Mr. Hay in evidence of satisfactory consummation."

Did these letters, coupled with the assent of the respondent to the plan outlined, constitute an escrow agreement, or did

they merely create an agency between the vendors and the appellant bank? In determining this question we must look to the situation of the parties and the surrounding circumstances. One of the grantors, at the time of the execution of the deed, was in Boston, Massachusetts, the other in Oakland, California. The purchaser was a Washington Corporation, having its principal place of business at the city of Seattle, where the property was situated and where the appellant had its banking house. The terms and conditions of the sale were agreed upon in every detail, and we are forced to the conclusion, as was the court below, that the vendors fully intended that their deed should be delivered over to the appellant, upon the terms agreed upon by their agent, and that they neither reserved nor intended to reserve control or dominion over the deed, if such conditions were complied with. The surviving grantor so testified at the trial, and there is nothing in the record to indicate that the other grantor viewed the matter in a different light during her lifetime. Joseph Shippen, the agent and successor in interest of Marion V. Shippen, attempted to recall the deed upon the death of his wife, but his acts in that regard are ineffectual for any purpose. If there was no delivery in escrow, the death of the principal revoked the appellant's authority to deliver the deed, and if there was an escrow agreement the death of one of the grantors would have no effect.

"The rule that the instrument does not take effect as a deed, bond, etc., until delivery or until performance of the condition is modified to the extent that, where justice requires it, the delivery will be held, by fiction of law, to relate back to the deposit, *ut res magis valeat quam pereat.* Any title acquired by the grantor between the deposit and the delivery passes by such delivery to the grantee. This principal applies where either of the parties to the instrument dies before the condition is performed, or before final delivery; whether grantor or grantee, or both parties." 16 Cyc. 588.

The contention that there was a defect of parties defendant cannot be sustained. The remedy of the purchaser in such

cases is against the escrow holder for refusal to deliver the instrument, and not against the vendors for specific performance. 16 Cyc. 598.

We find no error in the record and the judgment is therefore affirmed.

HADLEY, C. J., CROW, DUNBAR, and FULLERTON, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 6944. Decided November 16, 1907.]

BERTHA BURDICK, *Respondent*, v. MODERN WOODMEN OF AMERICA, *Appellant*.[1]

INSURANCE—MUTUAL BENEFIT SOCIETIES—FRAUD—AVOIDANCE OF CERTIFICATE—WAIVER. A mutual benefit society does not waive its right to avoid a benefit certificate for false representations of the deceased concerning former medical treatment and health from the fact that by mistake, and before proofs of loss were made, a clerk without authority sent notice that the claim was allowed and demanded and received an overdue assessment from the beneficiary, nor from the fact that there was a delay of several months in making an investigation of the claim, where the same was made in a reasonable time and all sums paid were tendered back to the beneficiary and her rights were not prejudiced in any manner.

Appeal from a judgment of the superior court for Pierce county, Poindexter, J., entered January 19, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a mutual benefit certificate. Reversed.

Geo. D. Emery (*Ben D. Smith* and *L. C. Stevenson*, of counsel), for appellant.

Boyle, Warburton, Quick & Brockway, for respondent.

[1]Reported in 92 Pac. 439.

Root, J.—Plaintiff sued as beneficiary upon a certificate of membership issued by the defendant, a fraternal beneficiary society, to E. W. Burdick, her late husband. Defendant alleged as a defense that material statements in the application on which the certificate was issued concerning former medical treatment and health of the insured were false, and that the company was not, therefore, liable on the certificate. Plaintiff denied this and also alleged a waiver of the avoidance claimed by the defendant. Attorneys for respondent in their brief make this concession: "For the purpose of this appeal, and under the rulings of the lower court, it may be assumed that such statements were in fact false, and that defendant is entitled to a reversal of the judgment if it can show that no waiver ever arose." Hence, the sole question for this court is as to the question of waiver.

The assured died at Butte, Montana, on March 10 or 11, 1905. The by-laws of the appellant provide that claims for benefits can be paid only upon presentation, in the prescribed form, to the board of directors, of due proofs of death, and allowance thereof by the board. They also provide that no officer of the society can waive any of the provisions of the by-laws, and that the head camp in regular convention assembled has the sole law-making power. At the time of Burdick's death there was due and payable the regular assessment for the month of March, which had been payable March 1, and would become delinquent March 31, 1905. Under the by-laws, this was not collectible except by express order of the board. The first information of the death of Burdick was the official notice sent by the clerk of the local camp, and received by the clerk of the head camp on March 23, 1905.

Upon the receipt of this notice, a statement of the standing of the deceased was prepared by the head clerk, and blanks for proof of death furnished the beneficiary. The pass report, sent by the clerk of the local camp with his remittance for February, was received by the head clerk April 10, 1905. This report was audited by a clerk in the head clerk's office

on April 14, 1905, and on that day, by mistake and without directions of the head clerk or the board of directors to so do, said employee sent the clerk of the local camp a notice with the stamped signature of the head clerk upon a printed form calling for payment of the March assessment due at the time of Burdick's death, and stating that the "claim of death of E. W. Burdick, late neighbor of Camp 10717, has been allowed and ordered for payment by the society's board of directors." At this time the proofs of death had not been sent to nor received by the head clerk or board of directors, and of course had not been considered or acted upon by them. Neither the head clerk nor the board knew of or authorized the sending of this notice, and did not learn thereof until the service of the complaint herein. The proofs of death were received by the clerk of the local camp April 15, and reached the head clerk April 20, after the board of directors had adjourned, or at about the time said board was to adjourn, and without being called to their attention at that time. It was first presented to the board on May 16, 1905.

About May 6, 1905, the beneficiary having received from the clerk of the local camp the notice heretofore mentioned, paid to him the $2 called for as the March assessment, and the same was forwarded to the head clerk on June 9, with the regular remittance for May, 1905. On May 16, the board first discovered the fact that the representations made in the application were false. This discovery was made from the proofs of death sent, and the matter was referred to one Saunders, a director, for investigation and report. At the following meeting in June, 1905, Director Saunders was not reelected but was succeeded by one A. M. Boyd. Two meetings thereafter passed without action, but at the third meeting, held in September, 1905, the board acted upon the proofs and information received and rejected the claim. Thereupon the full amount paid in by assured, together with the $2 paid in by the beneficiary, was tendered to the latter, but by her refused. On the commencement of this action, it was paid

into the registry of the court for her. The case came on for trial before a judge and jury, and resulted in a verdict for the beneficiary, upon which judgment was regularly entered. From this an appeal is taken to this court.

Numerous errors are assigned, but nearly all involve the question of waiver. We do not think the evidence shows any waiver. The demand for the $2 was inadvertently sent out. The beneficiary must have known this as the notice recited that the claim had been allowed and payment ordered when she knew the proofs of death had not been received. It is urged that the retention by the company of the $2 for several months amounted to a waiver of the forfeiture. We think not. The company was entitled to a reasonable time within which to make a thorough investigation of the matter. It cannot be said, under all the circumstances of this case, that there was an unreasonable delay. Respondent was not thereby injured in any material manner, nor were her rights prejudiced. The $2, with all payments made by the assured, were by appellant tendered to her and subsequently deposited in court for her benefit. There is no evidence of any intention on the part of appellant to waive the forfeiture, nor are there any facts established which constitute an estoppel. *Elliott v. Knights of Modern Maccabees*, 46 Wash. 320, 89 Pac. 929; *Sheridan v. Modern Woodmen*, 44 Wash. 230, 87 Pac. 127; *Hopkins v. Northwestern etc. Ins. Co.*, 41 Wash. 592, 83 Pac. 1019; *Hubbard v. Mutual Reserve etc. Ass'n*, 80 Fed. 681; 2 Bacon, Benefit Societies (3d ed.), §§ 421, 424; 2 May, Insurance, §§ 506, 510; 3 Cooley, Briefs on the Law of Insurance, pp. 2459-2461; Cooke, Life Insurance, § 102; 16 Am. & Eng. Ency. Law (2d ed.), 935, 939; 29 Id., 1093, 1105, 1108; *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. 216; Bigelow, Estoppel (5th ed.), 467; *Taylor v. Grand Lodge A. O. U. W.*, 96 Minn. 441, 105 N. W. 408; *Franklin Ins. Co. v. Sears*, 21 Fed. 290; *Weed v. London etc. Fire Ins. Co.*, 116 N. Y. 106, 22 N. E.

229; *Bennecke v. Connecticut Mut. Ins. Co.*, 105 U. S. 355, 26 L. Ed. 990; *Modern Woodmen v. Tevis*, 117 Fed. 369.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

MOUNT, FULLERTON, and RUDKIN, JJ., concur.

HADLEY, C. J. and CROW, JJ., took no part.

[No. 6963. Decided November 19, 1907.]

W. S. DUNLOP, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

CONTINUANCE—TRIAL—AMENDMENT—SURPRISE—APPEAL — REVIEW —DISCRETION OF COURT. The discretion of the trial court in denying defendant a continuance, on account of the trial amendment of the complaint, will not be disturbed on appeal, where it appears that, in an action for injuries sustained in the derailment of a street car, the plaintiff, four days before the trial, served notice of an amendment to add an allegation that the accident was caused by a flat wheel, the defendant making no claim that it had a valid defense thereto.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 4, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger through the derailment of a street car. Affirmed.

Sachs & Hale, for appellant.

Aust & Terhune, for respondent.

PER CURIAM.—Action for damages for personal injuries sustained by reason of the derailment of one of the appellant's cars. Upon the trial verdict was rendered for the sum of $400, judgment was entered thereon, and appeal taken.

Before the introduction of any testimony, plaintiff asked

[1]Reported in 92 Pac. 449.

leave to amend his complaint by inserting the words "which said car had by defendant's negligence become out of repair in that one of the wheels had been worn flat at certain points." Counsel for appellant objected to the amendment; whereupon counsel for respondent stated to the court that he had given notice, four days prior to the commencement of the action, that there would be an application for such an amendment. This notice was admitted by counsel for appellant; whereupon the court allowed the amendment, and denied the appellant's motion for a continuance; and it is insisted by the appellant that the court erred in this regard.

This case does not fall within the reason of the rule announced in *Wright v. Northern Pac. R. Co.*, 38 Wash. 64, 80 Pac. 197, which is relied upon by appellant. In that case an entirely distinct cause of action was set up in the amendment, and no time had been given to the defendant to prepare its defense on such cause of action. It was shown that the defendant was taken by surprise, and that if it had had time it could have successfully defended against the new cause of action. Here the defendant had already had four days' notice, and no claim or showing whatever was made, or attempted to be made, that it had a defense to the new matter pleaded. Under such circumstances, we would not be justified in interfering with the discretion of the trial judge in such matters. The errors assigned in relation to the giving and refusing to give instructions have been so often discussed by this court that it would be profitless to again enter into a discussion of the questions therein involved. We think no error was committed by the court in giving or refusing to give instructions.

In the light of the record, the other assignments seem to be without merit. The judgment is affirmed.

[No. 6713. Decided November 19, 1907.]

LEVI ELLIS, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—CLAIMS—NOTICE—DEFECT IN STREET—SUFFICIENCY OF DESCRIPTION. A claim for personal injuries describes a defect in a street with reasonable certainty and sufficiently directs the city officers thereto, where a large hole is erroneously located on the west side of a street, the notice further stating that it was near No. 228, which was a two story building on the east side, the street being only forty-six feet in width; it appearing that the city officers claimed to have made no examination of the east side, and took photographs not of the street, but of the west side only.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 27, 1907, dismissing an action for personal injuries sustained in a fall from a wagon by reason of a defect in a street. Reversed.

Wilson R. Gay, for appellant.

Scott Calhoun and *Elmer E. Todd*, for respondent.

DUNBAR, J.—The appellant claims to have been injured on the 9th day of January, 1906, in the city of Seattle, by driving into a hole which it is alleged the city negligently permitted to remain in the street. The claim for damages, which was filed within the time prescribed for filing such claims, was as follows:

"That on Tuesday, January 9th, 1906, at about 6:30 a. m., in the morning of the said day, while he, Levi Ellis, claimant herein, was driving a double team of horses and wagon on Westlake avenue, between Thomas and John streets, on the west side of said Westlake avenue, on and near the west trackage of the Seattle Electric Company, and near No. 228 Westlake avenue in the city of Seattle, King county, Washington, said street being regularly laid out by the city as a public thoroughfare and used by the people of said city as

[1]Reported in 92 Pac. 431.

such thoroughfare, the claimant Levi Ellis, while so driving at said place, the street being unlighted, the front wheels of said wagon went into a large hole in said street, the location of said hole and its condition being wholly unknown to this claimant, and this claimant being unaware of danger was precipitated from the said wagon, was thrown to the ground in said street, and received serious injuries hereafter described, for which he claims damages."

The description of the place where the accident happened was set forth in the complaint substantially as it was in the notice. Upon the examination of the plaintiff, it was ascertained that the accident occurred on the east side of the street instead of the west. The plaintiff, being a man who could not read or write, testified that the description in the notice and complaint was a mistake, and the attorney for the plaintiff also testified that it was a mistake which had crept in without his attention being called to it. Upon the conclusion of the testimony, the court took the case from the jury and dismissed the action, on the ground that there was a variance between the description in the notice and complaint and the proof adduced; so that the only question to be determined in this case is, was the description reasonably sufficient to notify the city authorities of the locality where the accident was alleged to have happened.

This court has uniformly placed a liberal construction upon the requirements of such notice, holding that the notice had a common-sense object, viz., to apprise the officers of the municipality of the location, so that it might be examined with a view to preparing a defense to the action if it was thought a defense should be made; that if it directs the attention of said officers with reasonable certainty to the place of the accident, the requirements of the notice have been met; and that it was not intended that the terms of the notice should be used as a stumbling block or pitfall to prevent recovery by meritorious claimants. *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138; *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386;

Bell v. Spokane, 30 Wash. 508, 71 Pac. 31; *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893; *Mulligan v. Seattle*, 42 Wash. 264, 84 Pac. 721.

The contention of respondent is that, when the officers of the city took the notice for the purpose of ascertaining the location, they were deceived and misled by reason of the fact that the notice stated that the accident occurred on the west side of said Westlake avenue on and near the west trackage of the Seattle Electric Company. Mr. Dennis, claim agent for the city, testified that when he went to examine the premises, he did not examine the east side of the street at all, but confined his examination entirely to the west side. The distance between the curbings on the street is only forty-six feet. Mr. Dennis, the claim agent and inspector, Mr. Thomas, the foreman of streets, and Mr. Lippert from the city engineer's office, all went out to view this street and took photographs, not of the street but of the west side of the street, claiming that they were not called upon to look at the east side of the street.

If there had been no more definite description than that the accident occurred on the west side of the street, it is barely possible that such officers might reasonably have been misled and would have been excused for not extending their observations a few feet further. But the notice also informed the city that the accident happened near No. 228 Westlake avenue, and No. 228 Westlake avenue is on the east side of the street. This was the definite description, and the most distinct landmark that was pointed out, and if an examination had been made near No. 228 Westlake avenue, which was a two-story building, the hole would undoubtedly have been found, or the place where the street had been repaired as indicated by the new lumber which had been placed over the hole.

When asked if there were any holes in the street on the east side, Mr. Dennis replied that he did not know; he did not look; standing severely on the language used in the notice

that it was on the west side of the street, and totally ignoring the more definite description that it was near No. 228 Westlake avenue. A street forty-six feet wide is a very narrow strip of ground, and it would seem impossible for three men, who were there for the purpose of viewing the street and finding an alleged defect in it, who went to the trouble of setting their camera and taking a photograph of the street, not to notice the street in its full width. The whole testimony convinces us that the city was not, or should not have been, misled by this notice; at least, that the circumstances should have been submitted to a jury for their determination on this question.

The merits of the case are not before us, but for the error of the court in taking the case from the jury and dismissing the action, the judgment will be reversed and a new trial granted.

HADLEY, C. J., RUDKIN, and CROW, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 6780. Decided November 19, 1907.]

M. B. BRUGGEMANN, *Respondent*, v. C. H. CONVERSE *et al.*, *Appellants*.[1]

SPECIFIC PERFORMANCE—CONDITIONS PRECEDENT—VENDOR AND PURCHASER—RESCISSION BY VENDOR—TENDER. A tender of performance by the vendee is not a condition precedent to an action for specific performance of a contract to sell land, where, before the time for performance had arrived, the vendor declared a rescission and repudiated the contract.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 17, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the

[1]Reported in 92 Pac. 429.

court without a jury, in an action for specific performance of a contract to convey real estate. Affirmed.

James Kiefer, for appellants.

Douglas, Lane & Douglas, for respondent.

DUNBAR, J.—The defendants were the owners of certain property in the city of Seattle, and on May 4, 1906, entered into the following contract:

"Seattle, Wash., May 4, 1906.

"Received of M. B. Bruggemann, as earnest money on account of purchase of the following described real estate, situate in King county, state of Washington, to-wit: Lot 5, block 5, division No. 1, Capitol Hill, sold for the sum of thirty-four hundred ($3,400.00) dollars, on the following terms of payment: $100.00 cash as above, $1,300.00 within ninety days, balance of $2,000.00 on or before May 1, 1908, all with 6 per cent annual interest from May 1, 1906. Abstract of title to be furnished without delay, and the form of conveyance is to be warranty deed, delivered within ninety days thereafter upon receipt of cash payments, and the securities for deferred payments. And it is agreed and understood by said purchaser that if the title is not good, and cannot be made good, this agreement shall be void, and the vendor shall not be liable for any damages, and the said sum of $100.00 dollars earnest money, paid by the purchaser, shall be returned to them. If the title is found to be good, and nevertheless not accepted by said purchaser(the deed being tendered), within the time as herein named, said earnest money is forfeited as the consideration paid for this agreement, and the owner of said premises shall be considered to have fully performed on his part and may declare this contract terminated. Time is made the essence of this agreement. Property to be free and clear of all incumbrances. (Signed and witnessed.)"

The appellants having refused to execute the deed for the land, for the alleged reason that the terms of the contract had not been complied with by the respondent, action was brought for specific performance.

The court found the contract as set forth above; that the title to the property had been accepted by the plaintiff; that

subsequently and on the 1st day of August, 1906, plaintiff tendered to defendants in the city of Seattle, King county, Washington, the sum of $1,300, in gold coin of the United States, the same being a portion of the purchase price as agreed upon in the contract, and tendered to the defendants a note signed by himself and wife in the sum of $2,000, payable on or before May 1, 1908, with interest at the rate of six per cent per annum from May 1, 1906, and a mortgage on said real estate above described, securing said note; that said note and mortgage were duly signed, executed, and acknowledged by the plaintiff and his wife; that the plaintiff further tendered to defendants a deed to be signed and acknowledged by the defendants conveying said property to the plaintiff, and demanded that the defendants perform their said contract and convey said property to the plaintiff; that the defendants at no time made any objections to the tender above mentioned or to the securities offered by the plaintiff to the defendants, but refused to convey said property as provided in said contract, and have failed to tender performance on their part of any of the obligations in said contract; that they have failed, neglected, and refused to carry out their contract, and failed and refused to accept the money tendered or to accept the note and mortgage, and have served upon plaintiff a notice in writing declaring the aforementioned contract rescinded and annulled, and have in all things failed, neglected, and refused to perform their contract for the sale of said real estate; that the plaintiff has paid into court the sum of $1,300 for the purpose of keeping his said tender, and that the plaintiff has at all times been ready and willing to pay to the defendants the moneys mentioned in said contract to be paid, and to deliver to the defendants the securities agreed upon for the balance of the purchase price of said property, and that the plaintiff has in all things fully performed his contract in the matters and things by him to be done and performed. A judgment was entered for specific performance and, in case specific performance could not be

made by reason of the defendants having incapacitated themselves, judgment for damages in the sum of $400 in addition to the $100 originally paid. From this judgment this appeal is taken.

It can readily be seen that, if the facts found by the court are justified by the testimony, the appellants have no defense to this action. But it is earnestly contended by the appellants, that the material findings of the court are not justified by the testimony; that the testimony of the respondent in many material respects was flatly contradicted by the testimony of the appellant C. H. Converse, and that the whole record shows that the testimony of respondent was so inconsistent with admitted facts that it was rendered unworthy of belief. We have carefully read all the testimony, the case being here for trial *de novo*, and are unable to arrive at the conclusion reached by the learned attorney for the appellants, but on the other hand are convinced that the facts found by the trial court are fully justified by the testimony; and without specially reviewing the testimony in this opinion, we are convinced that the respondent in fairness met all the obligations of his contract, while it was the studied effort of the appellants to prevent the performance of the contract. According to the terms of the contract, the deed should have been tendered by the appellants. This according to his own testimony was not done at any time before he attempted to rescind, or at all. The right to rescission, it seems to us, was, in effect, based more upon his delinquencies than upon those of the respondent.

The contention that the tender was not sufficient seems to us to be trivial. But even if it were not technically sufficient, the tender was not necessary in this case for, before the time within which the money was to be paid had expired and before tender of deed was made, the appellants had declared a rescission and had refused to convey, although the respondent in his anxiety to consummate the contract had prepared a

deed which he tendered to the appellants, asking them to execute it. It is universal authority that it is not necessary to continue a tender when the party for whose benefit the tender has been made repudiates the contract, for the reason that the law will not compel anyone to do an idle thing. The appellants, not having complied with the requirements of the contract in tendering a deed which was by the terms of the agreement made a condition precedent to receiving the purchase price, will not be heard to complain that the other party to the contract has violated its conditions. We decided in *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184, that, where a rescission of a contract was sought by the vendor who had not made a tender of the conveyance agreed upon in the contract, equity should insist upon a strict compliance on the part of one invoking its aid to declare a forfeiture.

Without particularizing, the testimony as a whole convinces us that the numerous contentions of the appellants are without merit, and that the objections made by the appellants to the acts of the respondent are mere quibbles, without substance, were made solely for the purpose of preventing a compliance with the contract, and are offered simply as a pretext for the noncompliance with the terms of the contract on his part.

The judgment should be affirmed.

HADLEY, C. J., MOUNT, CROW, and ROOT, JJ., concur.

[No. 6832. Decided November 19, 1907.]

BROADWAY HOSPITAL AND SANITARIUM, *Appellant*, v. SARAH J. DECKER, *Respondent*.[1]

FRAUDS, STATUTE OF—SALE OF LANDS—MEMORANDUM OF SALE—SUFFICIENCY. A statement in a receipt for rent agreeing to give the tenants the "option on buying for $12,000," is not a sufficient memorandum of a sale to take the same out of the operation of the statute of frauds, where the property is described as "House 322, Broadway," without reference to state, county or city, and where there was no statement of the consideration for the option, or of its duration.

SAME—PAROL EVIDENCE. Parol evidence is inadmissible to supply defects in the description of property for the purpose of taking the contract out of the operation of the statute of frauds, where it contained no indicia by reference to which the identity of the premises could be identified, and the description might apply to any city.

SAME—MEMORANDUM OF SALE—SEPARATE WRITINGS—SUFFICIENCY. Where a receipt for rent, given to the promoter of a corporation, contained also an insufficient agreement for an option, which failed to describe the property or the terms of the option, a subsequent formal lease to the corporation cannot be considered in connection with the option so as to take the case out of the operation of the statute of frauds, where the face of the writings bore no relation to each other, there being no mention of the option in the lease or of the lessee's connection therewith.

SAME—PART PERFORMANCE—POSSESSION UNDER A LEASE. One in possession under a written lease cannot urge the possession and the making of improvements as a part performance of an oral agreement for a conveyance to take the case out of the operation of the statute of frauds.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 4, 1907, upon sustaining a demurrer to the complaint dismissing an action for specific performance. Affirmed.

Aust & Terhune, for appellant.

William W. Wilshire, for respondent.

[1]Reported in 92 Pac. 445.

HADLEY, C. J.—In this cause the trial court sustained a general demurrer to the complaint. The plaintiff having elected to stand upon its complaint, and having refused to amend, the court entered judgment dismissing the action. The plaintiff has appealed from the judgment. The sole question to be determined is whether the trial court erred in holding that the complaint does not state a cause of action. The purpose of the action is to enforce specific performance of a contract, and it will be necessary to set forth at length the substance of the extensive allegations of the complaint.

The complaint shows that, at all times subsequent to March 29, 1906, the plaintiff was a corporation, and that the defendant was and is the owner of the real property over which the controversy arises; that on the 22d day of March, 1906, and at all times subsequent thereto until the organization of the plaintiff corporation, one McClure and certain other persons were engaged as promoters in the organization of the plaintiff and in the promotion of business for its use and benefit; that on said last-named date said McClure, for the use and benefit of the plaintiff, entered into an agreement with the defendant for the renting from defendant of all of lot 6, block 29, in A. Pontius' addition to the city of Seattle, with the exception of a small portion thereof in the rear on which was then and now is situated a small cottage; that the agreement provided, among other things, that said McClure, for the use and benefit of the plaintiff, would then and there pay to the defendant $10 as a first and partial payment upon the first three months' rent of the premises so to be leased, and that the plaintiff when organized should enter into an indenture of lease for the premises so to be let for the period of one year at the rental of $70 per month; that it was also further a part of said agreement, in consideration of the $10 paid, that the plaintiff when organized should, at all times during the year called for in said lease, have the right to purchase the whole of said lot upon the payment of the sum

of $12,000; that part of the terms of said contract for lease and the said option were reduced to writing and signed by the defendant, which said writing inclusive of the signature is as follows:

"Seattle, Wash., 3-22—1906.

"Received of Dr. R. A. McClure ($10.00) Ten Dollars as part payment on rent for House No. 322 Broadway, Bal. $200.00 to be paid April 15, 1906, for 3 mos. rent. Rent to be $70. The lease to be one year from May 1st—1906. I also agree to paint outside of house and also give parties occupying house option on buying for $12,000.

"Mrs. J. Decker."

It is averred that the defendant knew that McClure was engaged as promoter of the plaintiff, and that the contract was made for the use and benefit of plaintiff; that in furtherance of said agreement made by McClure in anticipation of its organization, the plaintiff, after its organization was effected, entered into a written lease with defendant for the property which is mentioned above, and that the same is described in the lease. It is alleged that, immediately after the agreement was made between McClure and the defendant, McClure, in behalf of and for the use and benefit of the plaintiff, entered into the possession of said premises and continued in such possession until the organization of the plaintiff, since which time the plaintiff has been and still is in possession; that McClure and the plaintiff have kept and performed every condition upon their or either of their parts to be kept and performed as in any manner growing out of said contract or of said lease; that the defendant has never at any time demanded of the plaintiff or of said McClure that they, or either of them, exercise the option given in said contract and pay said sum of $12,000, but that on the contrary the defendant has from time to time represented to the plaintiff that there was no necessity for haste in the matter of exercising the option; that the plaintiff has from time to time assured the defendant that it would avail itself of its option to purchase,

and that it would pay said sum of money before the expiration of the right to purchase as given in the contract; that the plaintiff has from time to time assured the defendant that, if she was desirous of having the option exercised at an earlier time than the final expiration of the time therefor, plaintiff would do so upon her request, but that she responded that it was immaterial to her and that she recognized plaintiff's right to exercise the option at any time within one year from the date of said contract; that the plaintiff has relied upon its said right to exercise its option at any time within said year, and has also relied upon the representations of the defendant that she recognized such right; for which reasons it has not, except as hereinafter stated, made a tender of performance upon its part; that on October 22, 1906, plaintiff tendered to the defendant $12,000, legal tender of the United States, and demanded a deed to the said lot.

It is alleged that the defendant made no objection to the form or sufficiency of the tender, but that, in total disregard of plaintiff's rights under the contract and in breach thereof, the defendant has refused to make any conveyance whatever to the plaintiff; that at all times since its organization the plaintiff has been engaged in conducting a hospital and sanitarium in the building described in said lease situated upon said lot, and that relying upon said option contract, the plaintiff has made many valuable improvements to said building with the knowledge and consent of defendant. The plaintiff offers to bring the $12,000 into court, or any such other or different sum as shall be by the court adjudged to be proper and just.

In order that appellant's full theory of the case may be understood, we have stated extensively the substance of the complaint. It will be seen that the initiation of the appellant's claim for specific performance is founded upon the written receipt of March 22, 1906, between McClure and the respondent. The subject-matter of the controversy is within the statute of frauds, and the appellant manifestly proceeded upon

the theory that the writing itself, and upon its face alone, is not sufficient to satisfy the statute. Evidently many of the allegations of the complaint were made with a view to the introduction of oral testimony. The substance of the complaint shows that the contract relied upon must have been partly in writing and partly in parol. For example, it cannot be discovered from the writing that the appellant had any connection with the contract either as a then existing or as a prospective corporation. The writing does not describe the property about which plaintiffs were contracting so that it can be identified and located. It simply refers to "House No. 322, Broadway." To say nothing of the ordinary, more minute description for identifying real estate, this writing does not even show the state, county, or city within which the property may be found. The writing does not disclose for how long a time the option was to continue, and it does not show what consideration, if any, there was for the option.

It cannot be said from the writing, except by mere inference, that the option period was coextensive with the lease period. The two subjects are in no manner so related that such an inference must necessarily be drawn. It cannot be said from the writing that the $10 paid was a consideration for the option, since it expressly stated that it was a payment upon rent. Appellant therefore found it necessary to allege a number of things as being part of the contract which the writing does not disclose, and such facts can be established by parol testimony only. It is the general rule that when an agreement has been reduced to writing the contents thereof cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence. This is not a mere rule of evidence where the statute of frauds is concerned, but it is of substantive law. 17 Cyc. 567-70.

Again, at page 748e of the above-cited volume, the following statement pertinent to this subject appears:

"The rule that where a contract upon its face is incomplete resort may be had to parol evidence to supply the

omitted stipulation applies only in cases unaffected by the statute of frauds. If the subject-matter of the contract is within the statute of frauds and the contract or memorandum is deficient in some one or more of those essentials required by the statute, parol evidence cannot be received to supply the defects, for this would be to do the very thing prohibited by the statute."

Appellant says it does not contend that parol evidence may be admitted in contradiction of any of the terms of the writing, but that it does contend that extrinsic evidence is admissible to show the actual land subject to the option. Upon this point appellant cites the following: *Easton v. Thatcher*, 7 Utah 99, 25 Pac. 728; *Bacon v. Leslie*, 50 Kan. 494, 31 Pac. 1066, 34 Am. St. 134; *Ross v. Purse*, 17 Colo. 24, 28 Pac. 473. The Utah case cited seems to be broad enough to warrant the contention that a mere attempt at a description may be made certain by extrinsic evidence. The other two cases dealt with descriptions which the courts held contained indicia by reference to which, coupled with the defective description otherwise, the identity of the premises could reasonably be determined. We find no such indicia in the writing before us. We think a description which may be referred to any city in the world where a street of the name may exist is too indefinite to satisfy even the most liberal view of the statute of frauds. The description is too vague and uncertain within the following authorities: *Ross v. Allen*, 45 Kan. 231, 25 Pac. 570, 10 L. R. A. 835; *Nippolt v. Kammon*, 39 Minn. 372, 40 N. W. 266; *Omaha Loan & Trust Co. v. Goodman*, 62 Neb. 197, 86 N. W. 1082; *Preston v. Preston*, 95 U. S. 200, 24 L. Ed. 494; *Wilstach v. Heyd*, 122 Ind. 574, 23 N. E. 963.

The complaint alleges that the written lease was executed in furtherance of the original contract. The written lease gives a definite description of certain property, but it was executed by respondent with appellant, a person entirely different from the one who was a party to the receipt, and it

makes no mention whatever of any option in favor of appellant or anyone else. It is a mere lease to appellant of a lot with the exception of a small cottage in the rear, while the receipt is for the rent of a house to another person. The two writings upon their face bear no relation to each other, and the description in the first is therefore not aided by reference to the second. If, however, it could be said that the two may be taken together and that so considered they show an option to purchase property sufficiently described, still appellant's connection with the option can be shown only by parol testimony since it is in no way mentioned in the writing which speaks of an option. Moreover, both together fail to show any time within which the option shall be exercised, and they also fail to show any consideration for the option. Viewed from any standpoint the essential features with reference to the alleged option must be established, if at all, by parol, because of the indefiniteness and uncertainty of the writing upon which appellant relies. Under such circumstances specific performance concerning subject-matter within the statute of frauds cannot be enforced.

Appellant relies further upon the allegation in the complaint that it went into possession of the property. By this it seeks to have the alleged contract specifically enforced as in case of an oral agreement partly performed. We think this contention cannot be sustained. The complaint shows that appellant was in possession as a lessee under its lease, and that it took no steps to put itself within the binding force of the alleged contract for an option until October 22, 1906, when it alleges that by its tender and demand in writing it exercised its alleged option. It was then, and for months prior thereto had been, in possession. The complaint in this suit was filed two days later. It is therefore manifest that possession was not taken under the option contract, and with respondent's consent, but that it was taken and was continued with her consent under the lease contract; that the part performance must have reference to the one agreement relied upon for specific

performance is not only sustained by the authorities, but is founded in fundamental and ordinary reasoning. For an exhaustive and interesting case upon this subject we cite *Maddison v. Alderson*, 8 App. Cas. L. R. 467. On page 485 Lord O'Hagan, in concurring in the opinion of the Lord Chancellor, pertinently observed as follows:

"But there is no conflict of judicial opinion, and in my mind no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance, in one particular. It must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwicke's words, 'as could be done with no other view or design than to perform that agreement! It must be sufficient of itself, and without any other information or evidence, to satisfy a court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced."

See, also, *Williams v. Morris*, 95 U. S. 444, 24 L. Ed. 360; *Purcell v. Miner*, 4 Wall. 513, 18 L. Ed. 435.

For the foregoing reasons we think the complaint does not state facts sufficient to support a decree of specific performance, and the trial court did not err in sustaining the demurrer.

The judgment is affirmed.

DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 7069. Decided November 19, 1907.]

G. M. LAURIDSEN, *Respondent*, v. F. S. LEWIS, *Appellant*.[1]

APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY. Upon appeal by defendant, the amount claimed by him in a counterclaim is the amount in controversy, and if over $200, the court has jurisdiction of the appeal.

SAME—FINAL JUDGMENT—PREMATURE APPEAL. An appeal by defendant from a judgment denying relief upon his counterclaim is not prematurely taken by reason of the pendency of plaintiff's motion to vacate the judgment denying plaintiff any relief, since the appeal was taken only from the other portion of the judgment, which the plaintiff would have no interest in vacating.

APPEAL—RECORD—STATEMENT OF FACTS. Under Bal. Code, §§ 5057, 5058, the respondent may propose and have certified a statement of facts or bill of exceptions, although the same is unnecessary to present appellant's case; but if the respondent has not appealed or excepted to the findings, the statement serves no useful purpose, and will be struck out.

Appeal by defendant from a judgment of the superior court for Clallam county, Still, J., entered July 9, 1907, upon findings generally in favor of the plaintiff but denying relief to either party, after a trial on the merits before the court without a jury. Motion to dismiss denied. Motion to strike statement of facts granted.

Trumbull & Trumbull, for appellant.

A. W. Buddress, for respondent.

HADLEY, C. J.—Respondent moves to dismiss this appeal, first, on the ground that the action is one at law for the recovery of money in which the original amount in controversy is less than $200. The appellant, as defendant in the action, interposed a counterclaim for the sum of $244.

"When the defendant files a counterclaim in the trial court and then appeals from a judgment against him, he occupies

[1]Reported in 92 Pac. 440.

substantially the position of a plaintiff appealing from an adverse judgment, and therefore the amount so claimed affirmatively by him becomes the appellate amount in controversy." 1 Ency. Plead. & Prac., p. 734.

A number of authorities are cited in support of the above text. See, also, *Sorrill v. McGougan*, 44 Wash. 558, 87 Pac. 825.

It is, however, further contended that the allegations of the answer do not constitute a counterclaim. We are not willing at this time to say that the facts stated will not support a counterclaim and that we are without jurisdiction for that reason. Inasmuch as there was a trial upon the facts, we think the facts, both alleged and found, must be considered together before finally determining upon their sufficiency, and to do so calls for an examination of the appeal upon its merits.

The second ground of respondent's motion is that the appeal is premature and is not from a final judgment. Findings of facts and conclusions of law were entered on July 5, 1907. The findings were generally in favor of the appellant upon his counterclaim, but the conclusions of law were that the counterclaim is barred by the statute of limitations. On the same day that the findings were entered, judgment was also entered to the effect that both parties are denied recovery by reason of the bar of the statute of limitations. On July 25, respondent filed what he called a "motion to strike findings, conclusions, and judgment." The transcript discloses no order of the court upon the above motion, and it is apparently still pending. The appeal of appellant was taken on August 2, after the filing of the above motion. We are not aware of any authorized procedure for the mere striking of a judgment. Perhaps the motion is, in legal effect, to vacate for irregularity that part of the judgment which denies respondent the right to recover. It is necessarily limited to the vacation of that part of the judgment, inasmuch as respondent has no interest in vacating that part which is in his favor and which

denies recovery to appellant. The appellant does not, however, appeal from that part of the judgment which respondent seeks to vacate, but from that part only which denies to appellant the right of recovery. Appellant's appeal was therefore not taken pending a motion to vacate the real judgment from which he appealed. Respondent insists that the case comes within the rule of *State ex rel. Hennessy v. Huston*, 32 Wash. 154, 72 Pac. 1015, and *Hennessy v. Tacoma Smelting etc. Co.*, 33 Wash. 423, 74 Pac. 584, where it was held that when a motion has been made to vacate a judgment for the reason that it was irregularly entered, the time to appeal begins to run from the date of the order denying the motion. The cases cited are not applicable here for the reason before stated, that in legal contemplation and effect there is no motion pending to vacate the actual judgment which this appeal attacks. The motion to dismiss the appeal is denied.

The appellant proposed no statement of facts in this case, his contention for the purposes of the appeal being that the conclusions of law and judgment as against him do not follow from the facts found. The respondent, however, did propose a statement of facts which was certified, and appellant has moved to strike it. The first ground of this motion is that the statement was proposed by respondent for the sole purpose of aiding him to dismiss this appeal, and that the same was settled without jurisdiction or power in the premises and over the protest of appellant. It is argued, in effect, that the party who appeals is alone competent to propose a statement of facts. Bal. Code, §§ 5057 and 5058 (P. C. §§ 674, 675), certainly authorize any party to any action or proceeding, and at any stage thereof, to propose and cause to be certified a statement of facts or bill of exceptions. It is therefore competent for one who does not appeal to propose a statement and procure its certification, a right which respondent had in this case.

The next ground of the motion is that respondent has not appealed, that the appellant has not excepted to the findings

of facts, and that the statement of facts can therefore serve no purpose in aiding the court to review alleged errors on this appeal. We think this point is well taken. Respondent had the right to propose and cause to be certified a statement of facts, to become a permanent part of the record of the cause, and to be used in the event of an appeal by either party, if its use should become material to the appeal. This statement is therefore properly a permanent part of the records of the cause, and it should not be stricken therefrom. But inasmuch as respondent has not appealed, and appellant makes no contest as to the facts found, the statement serves no purpose on this appeal. The motion to strike it is therefore granted so far as concerns this appeal only.

CROW, MOUNT, DUNBAR, and ROOT, JJ., concur.

FULLERTON and RUDKIN, JJ., took no part.

[No. 6627. Decided November 19, 1907.]

CHARLES N. PARK, *Respondent*, v. NORTHPORT SMELTING & REFINING COMPANY, *Appellant*.[1]

DAMAGES—INJURIES TO PROPERTY—TREES—MEASURE OF DAMAGES. In an action for damages from the destruction of growing trees, the measure of the damages is the loss or diminution in the value of the premises.

SAME—PLEADING. Where damages for the destruction of growing trees would be the same whether measured by the value of the timber or of the diminution in the value of the premises, it is immaterial upon what theory the complaint was drawn.

EVIDENCE—OPINIONS—INJURY TO TREES—WITNESSES—COMPETENCY. In an action to recover damages for the destruction of growing trees, witnesses qualified as experts on real estate values are incompetent to testify as to the loss sustained, where no attempt was made to qualify them as to the market value of the timber.

[1]Reported in 92 Pac. 442.

DAMAGES—INJURY TO TREES—TRESPASS—LIMITATIONS—EVIDENCE. In an action for damages to growing trees by reason of the operation of a smelter during and for several years prior to the running of the statute of limitations, the damages cannot be determined by evidence of the value of the land at the time of the commencement of the action as compared with two years previously, where it appears that much of the timber was destroyed without the statutory period, but rotted and decayed within the statutory period.

WITNESSES—COMPETENCY—DAMAGES — EVIDENCE — VALUE OF TIMBER. In an action for damages from the destruction of growing trees, a witness is competent to testify as to the number of thousand feet of saw timber on the land, although he was not an expert cruiser, where it appears that he measured the fallen trees and ascertained the number of feet therein and estimated the standing trees by comparison with the fallen trees of the same size.

DAMAGES—CERTAINTY. The difficulty of proving damages to growing trees during the period of the statute of limitations is no bar to a recovery of substantial damages.

WITNESSES—COMPETENCY—KNOWLEDGE OF FACTS. A witness knowing the fact from observation and experience may testify that trees were destroyed by the fumes from a smelter, although without expert knowledge.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered June 25, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages from a nuisance. Reversed.

C. S. Voorhees, Reese H. Voorhees, and *F. Y. Wilson,* for appellant.

Slater and *Allen,* and *Jesseph & Grinstead,* for respondent.

PER CURIAM.—This action was brought to recover damages for injuries caused to certain forest trees by the smoke and fumes from the Northport Smelter. The complaint alleged ownership of a certain tract of land in the plaintiff; that prior to the damage and injury complained of there was standing and growing on the land, in a healthy, thrifty condition, a large quantity of forest trees, suitable for saw timber and cord wood; that such forest trees would produce 600,000 feet

of saw timber and 2,500 cords of wood, of the reasonable value of $1,999; that for the two years next preceding the commencement of this action the defendant operated a smelter at Northport, about four miles from this land, and smelted thereat 1,000 tons of ore daily, about ten per cent of which consisted of sulphur; that the smoke and fumes caused by such smelting totally destroyed the forest trees aforesaid; that the plaintiff's said land was of the reasonable value of $3,500 with the trees standing and growing thereon, but by reason of the destruction of the timber is not worth to exceed $1,500, and that the plaintiff has been damaged by the wrongful acts complained of as follows:

"Saw timber destroyed as aforesaid.....	$ 600.00
"Cord wood destroyed as aforesaid.....	1,399.00
"Total	$1,999.00"

The trial resulted in a verdict and judgment for the plaintiff in the sum of $500, and the defendant has appealed.

The first question discussed by counsel is the measure of damages in this class of actions. We think the better rule is that, where the wrong consists in the removal or destruction of some addition, fixture, or part of real property, the loss may be estimated upon the diminution in the value of the premises, if any results; or upon the value of the part severed or destroyed, and that valuation should be adopted which will prove most beneficial to the injured party, as he is entitled to the benefit of his property intact. 28 Am. & Eng. Ency. Law (2d ed.), 543; *St. Louis etc. R. Co. v. Ayres*, 67 Ark. 371, 55 S. W. 159; *Argotsinger v. Vines*, 82 N. Y. 308; *Dwight v. Elmira etc. R. Co.*, 132 N. Y. 199, 30 N. E. 398, 28 Am. St. 563, 15 L. R. A. 612.

The appellant contends that the respondent in this case elected to sue for the value of timber destroyed and is bound by that election. We think the complaint was broad enough to warrant a recovery on either theory, but the question is of little importance here, as it was conceded by the complaint

and the proof that the damages under either rule would be the same, viz., the market value of the timber destroyed. To prove the issues on his part the respondent qualified his witnesses, by showing their familiarity with the land, and their general knowledge of land values in the neighborhood. He then propounded substantially the following questions to each of his four witnesses:

"State to the jury the value of Mr. Park's land on the 5th day of August, 1905, [the date of the commencement of the action] taking into consideration the condition of the timber at that time."

"State what the value would have been on August 5, 1905, had the timber been in the same condition that it was on August 5, 1903."

The witnesses were permitted to answer both of these questions over the objection of the appellant, the answers showing a difference in value of from $1,500 to $2,000. We think this testimony was incompetent for two reasons. First, the witnesses were not qualified. The sole issue in the case was the market value of certain timber, and in the nature of things the witnesses could not testify to that fact, unless they had at least some knowledge of the kind, quality, quantity and value of the timber in controversy. No attempt was made to qualify the witnesses in any of these respects, and a mere general knowledge of land values would not so qualify them.

In the second place, the respondent's testimony showed that the smelter had been in operation some six or seven years prior to the commencement of the action, and that considerable injury had resulted to the trees in question without the period of the statute of limitations. In answering the questions propounded, the witnesses necessarily took into consideration timber killed and destroyed by the wrongful act of the appellant without the statute of limitations, but which was of value within the statutory period and thereafter rotted and decayed. For such injury the respondent was not entitled to recover. In other words, the respondent could not recover

the value of timber destroyed without the statutory period, even though the timber may not have rotted or decayed until within the statutory period, and it appears from the testimony that much of the timber was in this condition.

We regret the necessity which compels us to reverse the judgment on this ground, as the respondent was compelled to prove his case in this way by erroneous rulings of the trial court. He sought in the first instance to prove his damages in a proper manner, but objections to his testimony were sustained. Thus, while the respondent was on the witness stand the following proceedings took place:

"Q. State to the jury if you estimated that timber according to any method? A. Yes, sir, I did. Q. What kind of a method did you use in estimating the number of thousands of feet of saw timber on that land? A. Instead of taking the elevation of the tree to get the height of it, you know, we used trees that were lying on the ground that fell down. We could measure them there. We had tape and all the necessary instruments to do the measuring with and we just simply measured the trees on the ground, we measured several of those, that is of different diameters of trees we measured and then we counted all the trees that were taken as being saw timber and then we concluded those trees— . . . We measured trees of various sizes and averaged them up by the thousand foot of trees. Those that would go 700 feet and those that would run as high as 3,000. Those we measured that go 700 and some of them as high as 3,000 and some 2,000 feet, and there were trees larger that we did not measure. Those larger ones we measured were laying down. In fact, all those we measured were laying on the ground. Q. As I understand you measured some of the trees that were lying on the ground. A. Yes sir. Q. And by that measurement you got an accurate number of feet of those logs that were lying down? A. Yes sir. Q. And then you compared, you estimated the trees that were standing with those which you had measured and which were lying down, for the purpose of determining the number of thousands of feet lying upon the land. A. Yes sir. And then we counted the trees in order to establish how many thousand feet there was. Q. Now, Mr.

Park, state to the jury please how many thousand feet of saw timber there was upon your land according to that estimate."

An objection to this question was sustained on the ground that the witness was incompetent, the appellant taking the position that the quantity of timber on the land could only be proved by an expert who had made a formal cruise of the timber as that term is understood among lumbermen. Such is not the law. If it were, the landowner whose timber is destroyed before cruised by an expert is without redress. We think the witness was qualified to answer the question propounded, and that the objection interposed by the appellant went to the weight rather than to the competency of the evidence sought to be elicited. We refer to this ruling at this time in view of a retrial that must be ordered on other grounds.

The appellant further contends that the court should have directed a judgment for nominal damages only. We are not prepared to say that the respondent was not entitled to recover substantial damages under the testimony offered, and the difficulty of proving such damages as accrued within the period of the statute of limitations is no bar to a recovery.

Numerous errors are assigned on the ruling of the court in admitting expert testimony tending to show the cause of the destruction of the trees. Many of these rulings may not occur on a retrial and we will not consider them in detail. It seems to us that much technical knowledge was wasted on this subject. If a witness knows from observation and experience that tree and plant life are destroyed by the fumes and smoke from a smelter he may testify to that fact, even though he may not be able to explain the chemical processes by which the destruction is wrought. On the same principal a witness may testify that a car is propelled by electricity though he may not understand the mechanism of the car or know how the electricity is generated or the mysterious power applied. We think this statement will be a sufficient guide for the court on a retrial of the cause which is now awarded.

The judgment of the court below is reversed, with directions to grant a new trial; and in view of the fact that the course pursued by the respondent was forced upon him by the erroneous rulings of the trial court, the costs in this court will abide the result of the new trial.

[No. 7036. Decided November 20, 1907.]

In the Matter of EAST GALER STREET and CRESCENT DRIVE, SEATTLE.

INTERLAKEN LAND COMPANY, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

EMINENT DOMAIN — DAMAGES — VALUE IN RELATION TO OTHER TRACTS. In proceedings to widen a public street by condemning a strip of land one foot wide and 394 feet in length, lying between the street on one side and unplatted lands owned by other parties on the other, which had no access to the street, the jury is bound to take into consideration the value of the strip in connection with the adjoining tract of the other parties, and a verdict for nominal damages on the theory that the strip was of no use to the owner in its present situation is unwarranted.

Appeal from a judgment of the superior court for King county, Griffin, J., entered February 26, 1907, in condemnation proceedings, after an award by a jury of nominal damages for property appropriated for the purpose of widening a street. Reversed.

E. H. Guie and *Hughes, McMicken, Dovell & Ramsey*, for appellant.

Scott Calhoun and *O. B. Thorgrimson*, for respondent.

RUDKIN, J.—This was a proceeding instituted by the city of Seattle to appropriate and condemn a strip of land owned by the Interlaken Land Company, for the purpose of widen-

[1]Reported in 92 Pac. 423.

ing a street. The land sought to be appropriated consisted of a strip one foot in width and 394 feet in length, lying between a public street on the one side and unplatted lands owned by other parties on the other. The jury empaneled to assess the damages awarded to the defendant the nominal sum of $1. A motion for a new trial was denied, and from the decree of appropriation the present appeal is prosecuted.

The testimony offered at the trial was very brief. That introduced by the city was to the effect that the strip had no market value. The witness for the appellant, on the other hand, testified that he would consider the strip worth "The difference between the value of the property that it fronts, as it is without frontage, and as it would be if it had frontage," which difference he placed at the sum of $11,000. At the close of the testimony the appellant requested, among others, the following instructions, which were refused by the court:

"4. You are instructed that in estimating the value of said one-foot strip you should take into consideration the value of said foot strip and the property adjacent to it, taken together and what said adjacent property is reasonably worth standing alone in its present condition.

"5. You are entitled to consider the land adjacent to said one-foot strip and extending back to a depth of three hundred and thirty-three (333) feet to the south [being the next street], and to estimate the value of said adjacent land with the frontage on a street and its value without frontage on the street to the north, and to consider whether the owner of said adjacent land would pay the difference in such values for said one foot strip for the purpose of getting access to said street to the north, and, if he would not pay such difference in values for said one-foot strip, how near he would reasonably come to paying such difference."

While the instructions given were adequate in ordinary actions of this kind, yet, under the peculiar facts in this case, we think the instructions requested, or instructions of like import, should have been given. But whether we would feel warranted in reversing the judgment for the mere failure to

charge as requested we need not determine, for we are convinced that a new trial should have been granted for error in the assessment of the amount of the recovery. The jury evidently concluded that the strip in controversy had no value in use, and consequently no value in exchange. The jury was fully warranted in that conclusion if this strip of land must be considered alone and without regard to its situation and relation to adjoining property. But the jury had no right to so consider it. The strip in controversy and the unplatted tract lying to the south, when taken together, are just as valuable as if owned by the same person. At the present time the unplatted tract at the back of this strip is less valuable, because cut off from access to the street, and the strip in and of itself, has no value; but in the nature of things either tract is of value to the owner of the other, and this fact the jury entirely ignored. A tract of land may be of value for but a single purpose; it may be of value to but few persons, and it may have no value, except in connection with other lands owned by other parties. But if it has a value for any purpose, or to any person, or in connection with other lands, a jury will not be warranted in finding that it is without value.

Thus in *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83, the land sought to be appropriated had little or no value, except as a part of a reservoir site when used in connection with lands owned by other parties, and in discussing the question of values in such cases the court said:

"2. But it is argued that the value 'as a reservoir site' should not have been taken, because there was no practicable site for a dam upon the defendants' property, the only use of which for reservoir purposes being in connection with the land of the plaintiff. But while it might perhaps have been more accurate to say 'a part of a reservoir site,' or for 'reservoir purposes,' we think this trifling verbal inaccuracy need not be noticed, and that the evidence was properly admitted. While it is true that the defendants' property had no value for reservoir purposes except in connection with the land of the

plaintiff, it is equally true that the plaintiff's property had comparatively little value for such purposes except in connection with the land of the defendants: the plaintiff's own evidence being that 'with the defendants' land included, the reservoir will hold about six thousand million gallons, and without the land of the defendants it will hold only about one-tenth that quantity.' And, this being the case, we can see no more reason for saying that the plaintiff can take the defendants' portion without regard to its value for reservoir purposes, than for saying that the defendants (if they had happened to commence proceedings first) could take the plaintiff's portion upon the same basis."

See, also, *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Harrison v. Young*, 9 Ga. 359; *Louisville etc. R. Co. v. Ryan*, 64 Miss. 399, 8 South. 173.

We do not concede that the appellant was entitled to a verdict for such sum as he might be able to obtain under peculiar circumstances when a price greater than the fair market value could be obtained, nor for a speculative value, nor for a value that the owner might obtain through the necessities of others; but we do hold that the jury should have taken into consideration the situation of this strip of land, its relation to the adjoining tract, the value of the adjoining tract without access to the street, its value with access to the street, and determine from these facts and all the surrounding circumstances what a prudent owner might reasonably expect to realize for the strip from the adjoining owner. While the owner of a strip of land like this should not be permitted to take advantage of the necessities of others in fixing its value in a proceeding of this kind, yet, on the other hand, neither a city nor the adjoining owner should be permitted to confiscate his property because of no value in use to him. Such we believe to have been the result of the verdict in this case, and the judgment of the court below is therefore reversed and a new trial ordered.

HADLEY, C. J., FULLERTON, DUNBAR, ROOT, CROW, and MOUNT, JJ., concur.

[No. 7072. Decided November 20, 1907.]

THE STATE OF WASHINGTON, *on the Relation of E. W. Ross, Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, Respondent.*[1]

OFFICERS — COMPENSATION — CONSTITUTIONAL LAW — INCREASE OF SALARY. Where the commissioner of public lands (an office created by the constitution) was elected for the term of four years and served for two years, drawing salary under general appropriation acts which, for ten years theretofore, allowed a salary of $2,000 per annum, his salary cannot be increased during his term of office by a general act fixing his compensation at $3,000, even if the same were the first general act fixing any salary for such officer.

Application filed in the supreme court October 28, 1907, for a writ of mandate to compel the state auditor to issue salary warrants to a state officer. Denied.

Frank C. Owings, for relator.

The Attorney General and *A. J. Falknor, Assistant*, for respondent.

CROW, J.—In November, 1904, the relator, E. W. Ross, was elected commissioner of public lands for a term of four years, commencing January 11, 1905, on which latter date he assumed office. The legislature of 1907, by chapter 94, Laws 1907, page 174, fixed the annual salary of the commissioner of public lands at $3,000, and in the general appropriations for the fiscal term beginning April 1, 1907, and ending March 31, 1909, Laws 1907, p. 488, appropriated for salary of the commissioner of public lands, at $3,000 per year, the sum of $6,000. The relator, relying upon this general legislation and the appropriation of 1907, has demanded of the respondent, C. W. Clausen, as state auditor, that he issue salary warrants to the relator from and after March 31, 1907,

[1]Reported in 92 Pac. 453.

at the rate of $3,000 per annum. The respondent refused to issue the warrants at any greater rate than $2,000 per annum, and the relator has applied to this court for an original writ of mandamus to compel him to issue warrants as demanded.

The office of commissioner of public lands was created by §1 of art. 3 of the state constitution. Section 23 of the same article provides that the commissioner of public lands shall perform such duties and receive such compensation as the legislature may direct. In § 7 of the act of 1890, creating "the state land commission," etc., approved March 27, 1890, Laws 1889-90, p. 251, it was provided that the commissioner of public lands should receive a salary of $2,000 annually. The relator contends that this act was repealed by necessary implication by chapter 125, Laws 1893, page 386, § 3 of which again fixed the salary of the commissioner of public lands at $2,000 per annum; that the act of 1893 was expressly repealed by § 106, chapter 178, Laws 1895, page 570; that the act of 1895 was expressly repealed by § 70 of chapter 89, Laws 1897, page 262; that the last-mentioned act utterly failed to fix any salary for the commissioner of public lands, and that there has at no time since 1897 been any law fixing such salary until the general act of 1907 above mentioned. He further contends that, as his salary was first fixed by the last-mentioned act of 1907, his compensation has not been thereby increased during his term of office, and that he is now entitled to be compensated at the rate of $3,000 per annum.

The respondent contends that the act of 1890, in so far as it fixed the salary of the commissioner of public lands at $2,000, has never been repealed either expressly or by implication; but has continued at all times until more than two years after the relator entered upon his present term of office; that the legislature has continually made appropriations for the compensation of the state commissioner of public lands, at the rate of $2,000 per annum, showing the legislative construction of the salary act of 1890, and subsequent acts above

mentioned, and that to now allow the relator the increased salary of $3,000 per annum will violate § 25, art. 3, of the state constitution, which provides that the compensation for state officers shall not be increased or diminished during the term for which they shall have been elected.

If respondent is correct in his contention that the relator's salary was fixed at $2,000 per annum when he entered upon his present term of office, by general legislation which continued in effect for more than two years thereafter, then the relator's application must be denied. Mr. Pierce, in preparing his compilation of the laws of the state of Washington, concluded that §§ 6 and 7 of the act of March 27, 1890, were not repealed, and therefore included them in his Codes of 1901 and 1905, as §§ 8157 and 8158; but, as we view this case, it will not be necessary for us to decide whether any general statute was in force from 1897 to 1907 inclusive, fixing the annual compensation of the commissioner of public lands at $2,000. For the purposes of this opinion, we will, without deciding, assume that no general act existed during that period fixing such compensation. The office of state land commissioner was created by the constitution. Statutes immediately enacted have been succeeded by other statutes continually defining the duties of the office. There can be no question but that, during the entire period from 1897 to 1907, inclusive, the commissioner of public lands has been compensated at the rate of $2,000 per annum for the performance of his official duties, and legislature after legislature has made appropriations accordingly.

Assuming that no general statute providing for a fixed salary existed during the period above named, the legislature, by making biennial appropriations for the commissioner at the rate of $2,000 per annum, directed what his compensation should be. The legislature of 1903 appropriated $4,000 for the fiscal period from April 1, 1903, to March 31, 1905. The relator came into office on January 11, 1905. He was

compensated from this appropriation at the rate of $2,000 per annum, for a period of over two months. The legislature of 1905 made an appropriation of $4,000 for his salary from April 1, 1905, to March 31, 1907, and he was regularly paid at the rate of $2,000 per annum by warrants issued against such appropriation, and was undoubtedly entitled to receive such salary. In the absence of any general statute, the legislature by these appropriations directed what the relator's compensation should be. If he is now permitted to receive more than $2,000 per annum, then we must conclude either that the act of 1907 fixing his salary at $3,000 applies to his entire term of office which commenced in January, 1905, and is retroactive; or that his compensation may be increased during his term of office in violation of § 25, art. 3, of the state constitution; but neither conclusion is tenable.

Conceding the absence of any general law, we are of the opinion that the legislatures of 1903 and 1905, by the appropriations above mentioned, directed what compensation the commissioner of public lands should receive, fixing the same at $2,000 per annum; and that such compensation could not be thereafter increased or diminished during the relator's term of office. This holding is in harmony with the reasoning of a well-considered opinion of the court of appeals of the state of Kentucky, in *Butler County Fiscal Court v. James*, 116 Ky. 575, 76 S. W. 402, which is a later case than *Marion County Fiscal Court v. Kelly*, 112 Ky. 831, 56 S. W. 815, cited by the relator.

In *Butler County Fiscal Court v. James, supra*, the appellee James had been elected to the office of county judge at the November election of 1893, and again at the November election of 1897. Under the law of that state it was the duty of the fiscal court to fix his compensation before his election. No such order was made for his second term prior to his election. In the absence of any formal order fixing his salary, the fiscal court afterwards made an appropriation of $500 for his compensation for the year 1898. Thereafter they

made an appropriation of $400 for 1899, $400 for 1900, and $500 for the year 1901, these appropriations being made by separate resolutions at different times. He accepted the appropriations made, and then brought suit to recover $200, claiming $100 extra for each of the years of 1899 and 1900. It seems that it was not only the duty of the fiscal court to fix the appellee's compensation before he was elected or entered upon the discharge of the duties of his office, but also to then fix the same for his entire term. This they failed to do and, during his second term, his compensation was only fixed by the several appropriations above mentioned. The constitution of the state of Kentucky contained a provision similar to ours against the increasing or diminishing of the salary of any officer during the term to which he has been elected. The court of appeals of Kentucky, in passing upon the claim of the appellee, said:

"The purpose of the constitutional provisions is to leave the officials, whose duty it is to fix the salary, free from the importunity and personal influence of the incumbent of the office, and to secure to him for his term, when his salary is once fixed, the amount so agreed to be paid him, and thus make him more independent in the discharge of his official duty. Under these provisions of the constitution it is the duty of the fiscal court to fix the salary of the county judge and other county officers, to be allowed by it, before their election; that is, there should be a general order fixing the salaries, and not an allowance each year for that year; and when the salaries are once fixed, they cannot be changed to affect those already elected or appointed, and any change will not take effect until after the next election or appointment. The Butler Fiscal Court, before the election of appellee, should have made a general order fixing the salary of the county judge; but if they had failed to do this they could fix it after his election, or else it could not be fixed at all, and the failure of the fiscal court to do its duty cannot be permitted to deprive the county judge of his reasonable compensation guaranteed him by law; but when his salary was once fixed, it could not be changed during his term, so that he would receive a different amount for different years of his term. The order

of the county court made at its October term, 1896, did not undertake to fix the salary of the county judge, or make any provision for it, except for the year 1897. It is substantially the same as the order in the case of the *Marion County Fiscal Court v. Kelly*, which was held only to apply to the year 1897. But the order made by the fiscal court on November 9, 1897, appropriated $500 for the county judge's salary for the year 1898, and he was under this order entitled to have a salary of $500 for the first year of his new term. If the court could by a subsequent order allow him a different amount, then his salary would be changed during his term, contrary to the express provision of the constitution. The difficulty with the orders made for the years 1899 and 1900 is that they change the salary of the county judge during his term of office."

By the same course of reasoning, we conclude that, in the absence of any general legislation fixing relator's salary, the appropriations made by the legislature from time to time fixed his compensation, and that, when he has once entered upon the discharge of the duties of his office under such fixed compensation and has received the same for his services during a portion of the term, his compensation cannot be increased or diminished during the term for which he has been elected, either by any general act of the legislature or by any appropriation bill.

The writ is denied.

HADLEY, C. J., DUNBAR, FULLERTON, and RUDKIN, JJ., concur.

MOUNT and ROOT, JJ., took no part.

[No. 6835. Decided November 20, 1907.]

C. J. ERICKSON, *Plaintiff and Appellant*, v. JOSHUA GREEN, *Defendant and Appellant.*[1]

DAMAGES — LIQUIDATED DAMAGES — PENALTY — CONTRACTS — CONSTRUCTION. A contract for the removal of earth within a certain time at a fixed price per cubic yard, containing a provision that the contractor agrees that a penalty of $10 shall be deducted from his compensation for each and every day that the work continues after the stipulated time for performance, is a contract for liquidated damages and not a penalty, and evidence of the actual damages sustained is inadmissible.

SAME—WAIVER. Where a contract for the removal of earth agreed upon liquidated damages for delay in performance, and provided for payment in three equal installments, the first to be paid when the work was half done, payment of the first installment after the time for completion had expired waives the stipulated damages for delay up to the time of such payment.

Cross-appeals from a judgment of the superior court for King county, Tallman, J., entered November 27, 1906, upon the verdict of a jury rendered in favor of the plaintiff, by direction of the court in an action on contract. Affirmed.

Shank & Smith, for plaintiff.

Ira Bronson and *D. B. Trefethen*, for defendant.

DUNBAR, J.—The plaintiff and defendant entered into an agreement, the substance of which was that the plaintiff Erickson agreed to remove all the soil from the surface of the lots mentioned therein which were owned by the defendant Green, and one-half of the width of the alley abutting on said lots on the east above the then reestablished grade of Second avenue and Pine street. The price agreed to be paid for the removal of the earth was twenty-five cents per cubic yard. The payment was to be made in cash, one-third of the

[1]Reported in 92 Pac. 449.

total when the work was half completed, one-third when the work was completed, the remaining one-third upon proof by Erickson that all claims against the property by reason of said work were fully satisfied; and the following clause was added to the contract:

"And the said C. J. Erickson hereby agrees that a penalty of $10 shall be deducted from his compensation for each and every day that said work continues uncompleted beyond the contract period of ninety days herein specified."

The work under the terms of this contract should have been completed on September 25, 1904. It was not completed in fact until the 1st of March, 1905. On the 16th day of December, nearly three months after the failure to complete under the contract, the defendant paid to the plaintiff Erickson $565, being one-third of the contract price. Nothing further was paid upon the contract, and this action was brought to recover the remainder of the contract price. The defendant set up the contract in defense, demanding $10 a day for the whole time which had expired between the time when the contract should have been completed and the time when it was actually completed. The court directed the jury to bring in a verdict for the plaintiff Erickson for the amount of the contract, deducting the amount paid, viz., the sum of $555.33, and the sum of $10 per day for the time which elapsed after partial payment made by defendant Green, allowing said $10 per day liquidated damages provided for in the contract; holding, in effect, that the defendant had waived the liquidated damages for the days between the time when the contract should have been completed and the time when the payment was made. Both parties appeal, the plaintiff contending that the contract was not a contract for liquidated damages but a contract for a penalty, while the defendant's contention is that the court should have allowed the liquidated damages for the entire time of the breach of contract.

The appellant Erickson complains that the court erred in excluding testimony offering to show that no buildings had been erected on the lots or in the immediate vicinity at the time of the trial, and that the defendant was not damaged by the delay in completing the work, etc.; and that the court erred in making conclusion of law No. 3, to the effect that the plaintiff was entitled to recover the amount which we have mentioned above.

The whole contention of the appellant Erickson may be disposed of by a determination of the main question, as to whether or not the contract provided for damages to be ascertained or whether it provided for liquidated damages, because if it was for liquidated damages then the testimony offered by the appellant Erickson was immaterial, for the matters and things sought to be proved by such offers had been determined by the terms of the contract. We think this was plainly a contract for liquidated damages, and the fact that the word "penalty" is used is of little value in construing the intention of the parties. Parties who execute contracts frequently do not understand the technical or professional meaning of the words employed, and if the court can gather from the whole contract the real intention of the parties, such intention will govern notwithstanding things which are contracted with reference to may be wrongly designated. In this case it is not difficult to determine that the material thing which was the subject of the contract was the deduction from the contractor's compensation of $10 per day for every day the work remained uncompleted beyond the contract period of ninety days; and that it was immaterial whether it should be designated as a penalty or as stipulated or liquidated damages. When the parties state what is to be done, the law will furnish the technical name for the transaction, which will be determined solely from the facts stated.

Outside of the use of the word "penalty" in this contract, this case falls squarely within the decision of *Reichenbach v.*

Sage, 13 Wash. 364, 43 Pac. 354, 52 Am. St. 51. That case involved a building contract, and the contractors stipulated that, in case of failure to complete the work by the time agreed upon for the completion, they would pay as damages a sum equal to $10 for each and every day said work and contract were delayed beyond said date, and we held that such contract was a contract for liquidated damages. This subject was discussed at length and many cases cited to sustain the rule announced, and it would serve no good purpose to repeat the argument there made, or to elaborate it especially, inasmuch as in a subsequent case, viz. *Everett Land Co. v. Maney*, 16 Wash. 552, 48 Pac. 243, the subject was again discussed at length, and the decision in *Reichenbach v. Sage* was affirmed, and it was again affirmed in *Jennings v. McCormick*, 25 Wash. 427, 65 Pac. 764.

Mr. Pomeroy, in his work on Equity Jurisprudence, vol. 1 (2d ed.), § 442, voices the almost universal rule that:

"Where an agreement is for the performance or nonperformance of only one act, and there is no adequate means of ascertaining the precise damage which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount of compensation payable by the defaulting party in case of a breach; and a stipulation inserted for such purpose will be treated as one for 'liquidated damages,' unless the intent be clear that it was designed to be only a penalty."

In fact, it would seem that it would only be an exercise of prudence and good sense for the parties in such case to determine and agree in advance what the damages would be in case of a failure to comply, thereby obviating the expense, delay, and uncertainty of a suit for damages.

That the damages in this case would be difficult to determine cannot be questioned. We think, therefore, the court properly construed the contract as a contract for liquidated damages. And we are not inclined to disturb the conclusion reached by the court that there was a waiver of the provisions

of the contract in relation to liquidated damages for the time which had expired prior to the payment made to the contractor by the defendant.

The judgment in all respects will be affirmed.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

RUDKIN and FULLERTON, JJ., took no part.

[No. 6903. Decided November 20, 1907.]

I. P. CALHOUN *et al.*, *Respondents*, v. JOHN NELSON, *a Minor*, and FREDERICK HILTON, *as Guardian*, *Appellants*.[1]

ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY. The evidence is insufficient to support a defense of adverse possession, where it appears that defendant was a boy, ten years of age, living with his mother at the time of the institution of the alleged adverse holding, without any color of title, or any adverse claim as to the other older members of the family, none of whom made any claim to the property.

APPEARANCE—PROCESS—WAIVER. A voluntary answer constitutes a general appearance and waives service of process.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 22, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to recover possession of real property. Affirmed.

Wheeler & Skeel, for appellants.

H. B. Madison and *Blaine, Tucker & Hyland*, for respondents.

DUNBAR, J.—This action was brought by the respondents against the appellants, under § 1142 of Pierce's Code (Bal. Code, § 5500), for the recovery of the possession of the north-

[1]Reported in 92 Pac. 448.

east quarter of section 24, township 22, north, range 5, east, W. M. The complaint alleged ownership, and that respondents were entitled to the possession thereof, and that the appellants were in possession of a portion of said real estate and were claiming title thereto. The defense on the merits was that neither the plaintiffs nor their ancestors had been seized or possessed of the premises within ten years prior to the commencement of the action, and that the defendant John Nelson, had, for more than ten years, to wit, since the 29th day of May, 1896, been in actual, visible, open, notorious, exclusive, hostile, adverse, and continuous possession of the premises under a claim of right and color of title. There was also a defense made under the seven-year statute in relation to the payment of taxes, but upon the defendant John Nelson testifying that he never had paid any taxes, this defense was withdrawn. Upon the conclusion of the testimony, the court gave judgment for the plaintiffs in accordance with the prayer of the complaint.

The record shows such an absolute want of proof to sustain the defense interposed to the complaint that it is difficult to discuss it. The plaintiffs proved title through two sources, one a tax foreclosure and the other a mortgage foreclosure. It seems that, after the foreclosure against the defendant John Nelson's father, in the year 1895, the father and his family, including the defendant, who was then nine years old, were permitted to remain on the premises. The father died in March, 1896, leaving his wife and five children on the farm, the defendant being then ten years old. So that it will be seen that to make his claim of adverse possession available it must have commenced at that early age. He was, however, then living with his mother and presumably under her control. The mother died in 1899, and at the time of her death the testimony shows that she with all the children had moved to the home of a neighbor by the name of Johnson. Said defendant, however, testifies that during that time he was on the

place every day looking after things. Immediately after the death of the mother, the children again took up their abode on the farm, two of the children, one sister and one brother, being older than the defendant. The older sister was eventually married and moved away. The other sister went to live with her, and the older brother finally left the place to take a homestead, while the youngest brother went to live, and is at present living, with the neighbor Johnson above mentioned.

There was no attempt to prove color of title or claim of right. Under such a state of facts, there was no escape from the conclusion reached by the court that "it was a novel proposition that a boy ten years old, living on property with his mother and brothers and sisters, was there holding adversely and claiming title as against all the world, which he must do to acquire title." Of course the presumption must be that he was under the control of his mother while she lived, and the testimony of the defendant's own witnesses is to that effect as a matter of fact. The defendant himself declined to testify that he had any thought of holding adversely to the interests of his brothers and sisters who lived with him. In short, there was no testimony whatever to support the affirmative defenses pleaded.

On the question of service, we think the defendants were legally served. In any event, they voluntarily answered, thereby making a general appearance in the case.

No error was committed by the court in the admission of testimony. No other judgment could have been rendered under the pleadings and testimony, and it is therefore affirmed.

HADLEY, C. J., ROOT, MOUNT, and CROW, JJ., concur.

RUDKIN and FULLERTON, JJ., took no part.

[No. 6794. Decided November 21, 1907.]

MATT BLOMSNESS, *Appellant*, v. PUGET SOUND ELECTRIC RAILWAY, *Respondent*.[1]

CARRIERS—PASSENGERS—TERMINATION OF RELATION—MASTER AND SERVANT—TORT OF SERVANT. A street railway company is liable for an assault committed by a conductor upon a passenger who, being entitled to a transfer, had stepped from the car to the street, as commanded to do by the conductor, and was requesting the conductor for the transfer at the time of the assault; as he had not been carried to his destination and the relation of carrier and passenger had not terminated.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 4, 1906, upon granting a nonsuit at the close of plaintiff's case, dismissing an action for personal injuries sustained by a passenger. Reversed.

Jackson Silbaugh, for appellant.

James B. Howe and *Hugh A. Tait*, for respondent.

DUNBAR, J.—This is an action for personal injuries alleged to have been sustained by the appellant by being struck in the face and on the head with a lantern, in the hand of a conductor who had charge of a train of cars on one of which the appellant was at the time a passenger.

The complaint alleges, that on July 4, 1906, the appellant, with his wife and two children, went on board one of defendant's passenger trains at Tacoma, Washington, to be transported to Seattle; that he there paid the conductor the usual and customary fare for such transportation; that under the rules and regulations of the company, he was entitled to a transfer from Seattle to Ballard; that when they arrived at Seattle, the conductor struck the plaintiff in the face with a lantern which he was using in his business and work as con-

[1]Reported in 92 Pac. 414.

ductor, and inflicted the injury for which damages are sought; that the only reason why the conductor struck the plaintiff was because the plaintiff asked the conductor for a transfer over the Ballard line.

The defendant denied the material allegations of the complaint, and alleged an affirmative defense which was denied by the plaintiff. After plaintiff had introduced his testimony and rested his case, defendant made a motion of nonsuit, claiming that the relation of common carrier and passenger had ceased to exist at the time the assault was committed. The court granted the motion, and judgment of nonsuit was entered.

The testimony of the appellant was to the effect that, at the time he paid the fare to the conductor, he asked him for a transfer on the Ballard car line, which he was entitled to under the rules of the company, and the conductor replied, saying, "I will give you that between Georgetown and Seattle;" that the appellant did not see the conductor as he was issuing transfers, and as the train rounded the corner of Yesler Way in Seattle and while the conductor was standing on the back platform of the car upon which the appellant was situated, the appellant again asked for a transfer on the Ballard line, whereupon the following colloquy ensued:

"He (the conductor) says, 'Why didn't you ask for a transfer when I was in the car to give a transfer?' 'Well,' I says, 'I didn't see you.' Then he told me to stand out to one side, because the train came to a stop at that time, and he was going down on the ground. Q. And then when it came to a stop what happened? A. He says to get out of the road for the passengers, and I stepped off, and I told him then—I says that I was told— Q. When you stepped off where did you go with reference to the train? A. I stood right by the side of him, right close. Q. Where was he? A. He stood on the step there, or on the side of the step—the handle of the car going in the— Q. How close to the car? A. He stood right up close to it, so he put his coat right up against the side, helping the passengers. Q. Off the car? A. Yes, sir. Q. And then you said to him what? A. I said to him that I was told that I was going to get a transfer between Georgetown and

Seattle, and I says, 'I didn't see any of you in there.' He says, 'Don't bother me; I ain't got any time now,' and so I knew—he was speaking in a very angry tone. Q. What was he doing at that time when you were talking to him? A. He was helping the passengers coming off of the car. Q. Well, then what happened between you and him after that? A. When they were all out I said to him, 'Am I entitled to a transfer on the Ballard line, or am I not?' and he says, 'Damn it, I told you before. Q. He says what? A. He swore. Q. What did he say? A. He says, 'Damn it, I told you before,' he says, 'that I was in the car there,' he says, 'and why didn't you open your face then?' and I turned around and I says to him, 'I didn't see you in the car, and I don't believe you were in there,' and so I turned around and was going to the car, and he says, 'What is that?' and he came for me, and kind of raised up his left hand and struck me on the shoulder a little bit, and just only turned me around, and he says, 'What is that?' and I says, 'I didn't see you in the car, and I don't believe you were in there.' He says, 'Don't say that to me,' he says, and then he hauled off with his lantern and struck me right over the head. Q. With what? A. With a lantern, so the glass and everything was all over my face and I fell down."

This is the substance of the plaintiff's testimony.

The pertinent question in this case is whether the appellant was a passenger at the time of the alleged assault. Upon the determination of this question depends the other question, whether the conductor was acting within the scope of his employment at the time the assault was made. If he was, the company was responsible for his tortious acts; if he was not, it cannot be held responsible, for it is well settled that the liability of the master for intentional acts which constitute legal wrongs can only arise when the acts complained of are within the apparent scope of the master's business. It is equally well settled that, within such scope, the master is liable, for the contract on the part of the company is to safely carry its passengers and to compensate them for all unlawful and tortious injuries inflicted by its servants. It is contended by the respondent, and that was evidently the view

taken by the trial judge, that in this instance the appellant had ceased to be a passenger at the time the assault was made upon him; and many cases are cited to sustain such contention. But an investigation of these cases convinces us that the decisions rendered were based upon an entirely different state of facts from the facts proven in this case. Booth on Street Railway Law, p. 445, is quoted as follows:

"But the general rule, applicable alike to general traffic roads and street railways, that all parts of their stations, platforms, and the approaches thereto must be kept in a safe condition, cannot be extended so as to include the public street in which passengers are received and discharged, and over which the street railway company has no control. The street is in no sense a passenger station for the safety of which the company is responsible. When a passenger steps from a car upon the highway and terminates his relations and rights as a passenger, the company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk."

This may be conceded to be the law, and it may be conceded that the distinction made between street railways and the ordinary steam railroad is a just one. The learned author further on bases the distinction upon the ground that the contractual relation is ended when the passenger alights from a street car, and that if he again boards the car he is responsible for another fare under another contract. But this reasoning is not applicable to the facts proven in this case, for it must be conceded that, under the contract made by the respondent, the appellant had not arrived at his destination when he alighted from the car in the city of Seattle, for he had paid for transportation to the city of Ballard. It was necessary for him to alight for the purpose of changing cars, and to receive the benefit of his contract it was necessary for him to travel outside of the car between the car from which he alighted and the Ballard car. The trip was a continuous one, and the fact that he had to change cars could not in justice or fairness

effect his rights as a passenger. The learned author just quoted, after stating the rule, at page 503, says:

"Therefore, the master is not liable for an act committed by his servant after he has stepped aside from his employment to commit a tort. Thus the act of a street car driver in making an assault on a passenger who had just left the car and gone to the sidewalk, for the purpose of making a complaint at the company's office against the driver, is not a tort for which the employer can be held responsible, although the assault was prompted by a quarrel between the driver and the passenger before the latter left the car."

At first blush this quotation might seem to sustain in a measure the respondent's contention. But the author cites, to sustain the text, *Central R. Co. v. Peacock*, 69 Md. 257, 14 Atl. 709, 9 Am. St. 425. An examination of that case shows a state of facts entirely different from those in the one at bar. There the plaintiff, after having been insulted by the conductor, got off at a stopping place, saying that he was going to the company's office to report the conductor. The car went on some distance after the plaintiff alighted, when it was stopped by the conductor, who left it, went across the street, and intercepted the plaintiff on the public sidewalk upon which he had been walking for a block or more, and the assault was there committed. The court, in the course of its comment, says:

"After he had alighted and walked a square, could he resume his place in the car without paying another fare, without the assent of the conductor? Would the conductor be justified in omitting to charge another fare? We think not. Had he remained in the car until the stables were reached and the horses were being changed, the carrier would have understood his journey was not completed, and whilst the horses were being changed he would still have been regarded as a passenger, and would have been entitled to protection as against the employes, if he then had gone into the office to execute his declared purpose to report;"

citing several cases to sustain that doctrine, which the court said was properly laid down.

"Those cases [said the court] only establish that while the car or boat may actually stop, the passenger need not confine himself to the boat, car, or vehicle in order to preserve his relation and rights as a passenger. But that is not the case here."

It will be seen that the case cited, which would have sustained the right of plaintiff to recover, cannot be distinguished in principle from the case at bar. In one instance, the horses were to be changed; in the other, cars were to be changed. In the one, the plaintiff had the privilege of leaving the car and still maintaining his rights as a passenger; in this instance, he was compelled by the necessities of the case to alight from the car; therefore making a much stronger case in favor of the plaintiff than the cases approved by the court in the case cited by the respondent.

The next case cited, viz., *Hanson v. Urbana etc. R. Co.*, 75 Ill. App. 474, was where the plaintiff while traveling on the car had an altercation with the motorman about a personal matter entirely disconnected from the car service, and was assaulted by the motorman. After the assault, plaintiff remained in his seat until he arrived at his destination, when he got off with safety on the public street, and while he was approaching the sidewalk the motorman got off on the opposite side of the car, followed him up, and again assaulted him. The action brought consisted of two counts, one for the assault made while on the car, and the other for the assault made on the street, and the appellate court allowed him to recover on the first count only, saying:

"We hold, under the evidence in this case there should be no recovery under the second count in the declaration. When the plaintiff in error arrived at his destination and safely alighted from the car on the public street, that then the contract of carrier and passenger was at an end."

There is certainly no parallel between the two cases. In this case the plaintiff had *not* arrived at his destination. On the contrary, it was his request to be taken to his destination

under the terms of his contract which was the subject of the controversy.

The next case, viz., *Palmer v. Winston-Salem R. & Elec. Co.*, 131 N. C. 250, 42 S. E. 604, is also a case where the plaintiff had arrived at his destination and had gotten off the car and deposited his bundles on the sidewalk, then returned to the car and resumed the altercation with the motorman, and again got off the car, when the motorman followed him up and assaulted him. No comment seems to be necessary on this case. An excerpt from the opinion of the court, however, shows what the decision would have been if the facts presented had been similar to the facts in this case.

"If the plaintiff had been a passenger, or his passage had not been fully terminated, or if, when he left the car at his destination, the employee had assaulted him, the defendant concedes that there would be no question as to the liability of the company;"

citing *Daniel v. Petersburg etc. R. Co.*, 117 N. C. 592, 23 S. E. 327; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879; *Strother v. Aberdeen etc. R. Co.*, 123 N. C. 197, 31 S. E. 386. But, said the court: "Here the passage had terminated for the passenger had deposited his bundle and then returned to the car." And without specially reviewing the other cases cited, we find them all to be of the same character as those above noticed.

A case more directly in point is *Wise v. Covington etc. Street R. Co.*, 13 Ky. Law 110, 91 Ky. 537, 16 S. W. 351, where it was held that a street railway company is liable for assault by the driver upon a passenger after the latter has left the car on account of the insults of the driver, where the assault was a direct continuance of the abuse begun on the car. In this case, as above indicated, appellant had not arrived at his destination, and the assault was a direct continuance of the controversy begun on the car.

Respondent seems to place some stress upon the fact that there had been no angry words passed between the appellant

and the conductor on the car. The fact that the appellant in demanding his rights had demeaned himself in a gentlemanly manner, and had not precipitated a row in the car, should not militate against his right to recover. He did only what he was compelled to do to urge his rights. When he made a request for the transfer, the conductor told him to get off the car and out of the way as he was busy helping the passengers off. This he did. He did not leave the car; did not show any inclination or make any intimation that he was intending to leave it, but remained and persistently demanded his rights. We think, under all authority and in accordance with principles of right, that the appellant should be deemed a passenger at the time of the assault, and should be allowed to recover.

The judgment will be reversed, with instructions to overrule the motion for nonsuit.

HADLEY, C. J., RUDKIN, MOUNT, FULLERTON, and ROOT, JJ., concur.

[No. 6636. Decided November 21, 1907.]

THE STATE OF WASHINGTON, *on the Relation of the Great Northern Railway Company et al., Respondents*, v. THE RAILROAD COMMISSION OF WASHINGTON *et al., Appellants*.[1]

CARRIERS—REGULATION OF RATES—RAILROAD COMMISSION—PLEADING AND ISSUES. Under Laws 1905, p. 145, § 3, authorizing the railroad commission to determine the reasonableness of rates, "Upon complaint made," and after a full hearing, the commission cannot, upon a complaint as to certain distance tariffs, make an order that certain other commodity rates shall not be increased, where the complaint alleged the latter to be fair and reasonable; since no issue was presented thereon and no order could be made relating thereto without notice and hearing; the remedy for an increase of such rates being by another complaint.

[1]Reported in 92 Pac. 457.

Appeal from an order of the superior court for Walla Walla county, Brents, J., entered December 21, 1906, in favor of the plaintiffs, overruling a demurrer to the petition, in an action to review an order made by the state railway commission fixing rates to be charged for the carriage of freight. Affirmed.

The Attorney General and *E. C. Macdonald* and *A. J. Falknor, Assistants*, for appellants. The railway commission may be authorized to fix rates. 19 Am. & Eng. Ency. Law (2d ed.), 686, and cases cited in notes; 23 Id., 658; *McWhorter v. Pensacola etc. R. Co.*, 24 Fla. 417, 5 South. 129, 12 Am. St. 220, 2 L. R. A. 504; *Storrs v. Pensacola etc. R. Co.*, 29 Fla. 617, 11 South. 226; 10 Cent. Dig., Constitutional Law, § 100, and cases cited; *Chicago etc. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 41 Am. St. 278, 24 L. R. A. 141; *Atlantic Exp. Co. v. Wilmington etc. R. Co.*, 111 N. C. 463, 16 S. E. 393, 32 Am. St. 805, 18 L. R. A. 393; Laws 1905, page 145, chapter 81; *Steenerson v. Great Northern R. Co.*, 69 Minn. 353, 72 N. W. 713. The power to fix rates is legislative and administrative. *State v. Chicago etc. R. Co.*, 38 Minn. 281, 37 N. W. 782; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *In re Interstate Commerce Commission*, 53 Fed. 476; *Interstate Commerce Commission v. Cincinnati etc. R. Co.*, 76 Fed. 183; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047; *Forsyth v. Hammond*, 18 C. C. A. 175, 71 Fed. 443; *State v. Simons*, 32 Minn. 540, 21 N. W. 750; *In re Village of North Milwaukee*, 93 Wis. 616, 67 N. W. 1033; *United States v. Ferriera*, 13 How. 40, 14 L. Ed. 42; *Gordon v. United States*, 117 U. S. 697; *In re Sanborn*, 148 U. S. 222, 13 Sup. Ct. 577, 37 L. Ed. 429.

M. J. Gordon (*L. C. Gilman, B. S. Grosscup*, and *W. W. Cotton*, of counsel), for respondents.

FULLERTON, J.—The Railroad Commission of Washington, on receiving complaints in writing to the effect that the freight tariff charged by the several railway companies operating in the State of Washington from Walla Walla to other places in the state were in excess of the charges for similar commodities shipped to the same places from certain other points and were unjust and discriminatory, within the meaning of the act establishing a railroad commission, instituted an inquiry to ascertain the correctness of the charge. To that end it prepared a complaint embodying the charges, and caused the same to be served upon the railway companies named, together with a notice to the effect that the matter complained of would be inquired into at a hearing to be held at Walla Walla on a certain date named in the notice. The complaint so filed and served contained, among others, the following allegations:

"XV. That said defendant railroad companies, the Northern Pacific Railway Company, the Great Northern Railway Company and the Oregon Railroad & Navigation Company, and each of them, have promulgated, adopted and filed with the Railroad Commission of Washington, and have now in use, what is known as class and commodity rates on freight consigned from Seattle, Tacoma, Everett, Snohomish, Bellingham and Spokane to other points in the state of Washington, which rates so shown and enforced are fair, just and reasonable rates and charges.

"XVI. That all shipments in less than carload lots from other points in the state of Washington, excepting the special freight rates hereinbefore referred to, from Walla Walla, are governed and controlled by the distance tariff promulgated and enforced by the different defendant railroads, and each of their distance tariffs have been filed with the Railroad Commission of Washington.

"XVII. That the distance tariffs charged and enforced by the defendant railroads are greatly in excess of the commodity tariffs above mentioned, and in many instances double the amount of the commodity tariff for like distances under similar conditions, particularly in that portion of the state known as Eastern Washington.

"XVIII. That by reason of these facts an unjust discrimination exists, the railroads unjustly discriminating in favor of one locality as against other localities, in this, that freight originating in Spokane and destined to other points in Eastern Washington, to-wit: Colfax, Garfield, Sprague and other points, can be and is carried for approximately one-half the sum that similar freight originating at other points, to-wit: Colfax, Garfield, and Sprague and other stations of like distance to Spokane and other points in Eastern Washington can be and is carried under similar conditions.

"XIX. That said distance tariffs as charged by said defendant railroads are unjust and unfair and greatly in excess of what would be a fair, just and reasonable rate, and the same are unjustly discriminatory against other localities other than those possessing special commodity rates, and the same should be modified and changed, and a fair, just and reasonable rate or rates substituted therefor."

A hearing was had at Walla Walla on the date named, at the conclusion of which the commission found the facts substantially as they were set forth in the complaint. It thereafter entered the following order:

"This cause coming on for hearing on the findings of fact filed herein, and it appearing to the commission this cause has already been regularly heard, evidence having been introduced by and on behalf of complainant and by and on behalf of defendants, the cause having been duly argued and submitted and findings of fact having been filed therein, the commission being fully advised does now make the following order: That the classification of freight in the general distance tariffs promulgated and in force by the different defendant railroads, and numbered as follows:

"Northern Pacific Railway Company, General Distance Tariff No. 14275-WRC No. X-21, Jan. 25, '04. All of page 2, except the commodity, live stock, in No. 17756-WRC. No. X-32, June 5, '05. All of page 2, N. P. No. 14811-WRC, No. X-22, July 14, '04.

"Great Northern Railway Company, General Distance Tariff GFO No. 17300-WRC No. 7, Aug. 15, '06.

"Oregon Railroad & Navigation Company, General Distance Tariff L36-WRC No. X-4, June 6, '04.

"Washington & Columbia River Railway Company, all of page 9, W&RC No. 1700-WRC No. X-1, June 5, '05. Be changed in so far as the relation which each class bears to the other, and that in lieu thereof the charges on the different classes of freight shall hereafter bear a fixed percentage relation to each other, as follows:

Second class .....85 per cent of first class
Third class .....70 per cent of first class
Fourth class .....60 per cent of first class
Fifth class .....50 per cent of first class
A class .....50 per cent of first class
B class .....40 per cent of first class
C class .....30 per cent of first class
D class .....25 per cent of first class
E class .....20 per cent of first class

"And it is further ordered: That the maximum charge on first class freight shall hereafter not exceed, for 5 miles or under, 10 cents per one hundred pounds; that there shall be added thereto a charge not to exceed 4 cents per one hundred pounds for each additional 5 miles said merchandise is carried up to and including 20 miles; that there shall be added thereto an additional charge of not to exceed 3 cents per one hundred pounds for each additional 5 miles over 20 miles and up to and including 50 miles that said merchandise may be carried; that there shall be added thereto a charge not to exceed 2 cents per one hundred pounds for each additional 5 miles over 50 miles and up to and including 300 miles that said merchandise may be carried; that there shall be added thereto a charge not to exceed 1 cent per hundred pounds for each additional 5 miles over 300 miles that said merchandise may be carried; that the maximum charge on other classes of freight shall be the percentage heretofore set out, which said class bears to first class freight for like distances as above provided: Provided, however, That the tariffs now in force, other than the distance tariffs above specified, shall not be changed so as to increase the rates, nor shall the said tariffs be cancelled without first obtaining the consent of the Railroad Commission of Washington."

Thereafter, the railway companies affected by the order petitioned the superior court of Walla Walla for a review of

the same, averring that the proviso to the effect that the tariff now in force, other than the distance tariffs specified, should not be cancelled or changed so as to increase the rates, without the consent of the commission, was beyond the powers of the commission and therefore void. The trial judge, on a demurrer to the petition, adjudged the proviso void and of no effect, and entered an order accordingly. The railway commission appeals.

By the third section of the act creating the railway commission of Washington, the commission is:

"Vested with power and authority, upon complaint made as hereinafter provided or by inquiry upon their own motion, after a full hearing, to make any finding declaring any existing rate for transportation of persons or property, or any regulation whatsoever affecting said rate or charge for transportation of loaded or empty cars or demurrage or reciprocal demurrage or the sufficiency of the train service and waiting rooms for passengers and rooms for freight and baggage to be unreasonable, or unjustly discriminatory, or insufficient, and to declare and order what shall be a just and reasonable rate, practice, regulation or thing to be charged, imposed, enforced or performed or followed in the future in the place of that found to be unreasonable or unjustly discriminatory or insufficient." Laws 1905, page 145, § 3.

Manifestly the express power to fix and establish rates conferred on the commission by the language here quoted, is power only to fix and establish rates to be followed in the future in place of rates found by the commission, after notice and full hearing, to be unreasonable or unjustly discriminatory; it does not expressly empower the commission, on complaint that particular rates are unreasonable or unjustly discriminatory, to establish or correct rates elsewhere against which no complaint is made, nor does it confer on it power to forbid railroad companies, operating in the state, from changing or modifying their existing tariffs not theretofore fixed by the commission, without the consent of the commission. Nor do we think the power here sought to be exercised

can reasonably be implied from the power conferred. It is true, as argued by the Attorney General, that the railroads may retaliate for any reduction of rates at one place by raising rates elsewhere sufficient to recuperate their losses, but we think the remedy intended by the act in force at the time this order was made was to institute a new inquiry, and proceed to a new hearing, until all tariffs throughout the state should be governed by orders made by the commission; that it would be going too far to say that the commission might, in order to adjust the rates from Walla Walla to other parts of the state, make permanent all existing railway tariffs.

It is further contended by the commission, however, that if the proviso is too broad as entered, it should be modified only so as to prevent its application to tariffs not specially mentioned in the complaint, but should be allowed to stand in so far as it affects the class and commodity rates on freight consigned from Seattle, Tacoma, Everett, Snohomish, Bellingham, and Spokane to other points in the state, which the commission found to be fair, just, and reasonable, since these rates were specially mentioned in the complaint. But an examination of the complaint will show that no complaint was made concerning these rates, but, on the contrary, that it was specially alleged that they were fair, just and reasonable. This raised no issue that the railroads were bound to answer. They were obligated to answer only as to those rates alleged to be unreasonable or unjustly discriminatory, and it is only such rates that the commission has power to adjust. Of course the commission may find the complaint not well founded, and may fix the existing rate as the future rate to be maintained, in which case the railroad would be without power to change it without consent of the commission; but as the law existed when the hearing here complained of was had, the only power to fix permanent rates conferred on the commission, was in cases where a complaint was made in some form charging the existing rate to be unreasonable or

unjustly discriminatory, and the railroads given an opportunity to be heard thereon.

The order appealed from is affirmed.

HADLEY, C. J., RUDKIN, CROW, MOUNT, DUNBAR, and ROOT, JJ., concur.

[No. 6867. Decided November 21, 1907.]

MARGERY A. DUEBER, *Respondent*, v. GEORGE W. WOLFE, *Appellant*.[1]

QUIETING TITLE—PLEADING—COMPLAINT—SUFFICIENCY. That the complaint in an action to quiet title does not show that the plaintiff was in possession or that the land was unoccupied is not ground for objection, if it states facts entitling the plaintiff to any relief.

PLEADING — ANSWER — AFFIRMATIVE ALLEGATIONS—REPLY—NECESSITY. In an action to quiet title to property levied upon as that of the community and claimed by the plaintiff as her separate property, an answer affirmatively alleging that the same was community property, amounts to no more than a denial and requires no reply.

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—EVIDENCE—SUFFICIENCY. Evidence that a lot was purchased by a wife with funds she had at the time of her marriage and had kept about her person and under her immediate control for five years, is sufficient to sustain findings that the property was her separate property; the credibility of her testimony being for the trial court.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered May 13, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to set aside a sale of real property on execution, and to quiet title. Affirmed.

W. W. Langhorne, for appellant.

Elliott & Hamaker, for respondent.

[1]Reported in 92 Pac. 455.

FULLERTON, J.—March 9, 1906, the appellant Wolfe recovered a judgment in the superior court of Lewis county against the respondent and her husband, George Dueber, on a debt contracted by the husband for the benefit of himself and his wife, the debt being a community debt. A writ of execution was issued on the judgment, and a certain lot in the town of Winlock was levied upon and sold thereunder. The record title to the lot stood in the name of the respondent, it having been conveyed to her in 1879 by one Pagett for a consideration of $40. After the sale of the lot under the writ, the respondent began the present action to set the sale aside and quiet her title to the lot, alleging in effect in her complaint that the lot was her separate property, and not subject to sale in satisfaction of a community debt of herself and her husband. An answer was filed which put in issue the allegations of the complaint, and set up affirmatively facts thought to show that the property was subject to the community debts of the respondent and her husband. To the affirmative answer no reply was filed, and after the time fixed by rule of court for filing a reply had expired, the appellant moved for a default and judgment for want of a reply to the affirmative plea. This motion the trial court denied, and afterwards entered upon the trial of the cause, finding in favor of the respondent and entering judgment in accordance with the prayer of her complaint.

The first assignment necessary to be noticed, although not the first in order in the brief, is the contention that the complaint fails to state facts sufficient to constitute a cause of action, in that it fails to allege that the plaintiff was either in possession of the property or that it was unoccupied. The complaint, however, stated the facts giving rise to the respective claims of the parties, and this was sufficient under the rule in *Baldwin v. Baldwin*, 46 Wash. 106, 89 Pac. 483, regardless of the question as to which of the parties was in the possession of the property. *Spithill v. Jones*, 3 Wash. 290,

28 Pac. 531, and the subsequent cases holding a contrary doctrine being expressly overruled in that case.

The next contention is that the court erred in refusing to grant the appellant's motion for judgment on the pleadings, for the reason that the respondent did not deny the affirmative allegations in the answer. These allegations were, in substance, that the debt for which the judgment was obtained was a community debt contracted for the support of the community, and that certain improvements had been put upon the property with community funds. But these averments tendered no new issue. They but tended to show that the property levied upon and sold was community property, a question already at issue by the allegations of the complaint and the denials contained in the answer. The respondent therefore was not called upon to reply to them, and could not be put in default by failing so to do.

The questions of fact presented were resolved by the trial court in favor of the respondent. Counsel for the appellant criticizes the evidence on which these findings are based with some severity, contending that such evidence bears its untruthfulness upon its face. The respondent testified that the purchase price paid for the lot was a part of a larger sum which she possessed at the time of her marriage some five years before, and which she had kept about her person and under her immediate control during all of that time. Both she and her son testified that the first improvements put upon the lots were destroyed by fire sometime in the '90's, and that the buildings now on the premises were erected thereon by the son at his own cost and expense, and by him presented to the mother, after their use by the son for a short time, because she was then in somewhat straightened circumstances and he desired that she might have some independent means of support.

There is nothing in the record that directly contradicts these statements, and we do not think they are so inherently improbable as to be incapable of belief. It may be somewhat unusual for a married woman, whose husband was only in ordi-

nary circumstances, to keep specific pieces of money about her person and under her control for a period of five years, but some other reason that its mere improbability must be shown before an appellate court would be justified in discrediting it entirely. To determine the truthfulness of the statement the court must rely largely on the credibility of the witness, her character for prudence, truth and veracity, and where there is nothing in the record to impeach either of these, the witness' statements should not be discredited for the first time in a court that does not have the witness before it, and hence not the best opportunity to judge of her credibility.

The same thing can be said of the testimony of the son, who likewise stands unimpeached on the record. Moreover, it would seem that the time was not so remote since the buildings on the lot were erected but that his statement to the effect that he constructed them could have been controverted if untrue. We think the evidence justified the findings, and the judgment will stand affirmed.

HADLEY, C. J., RUDKIN, CROW, DUNBAR, MOUNT, and ROOT, JJ., concur.

[No. 6918. Decided November 21, 1907.]

NELS C. RAVEN, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURIES—ASSUMPTION OF RISK—DANGERS—METHOD OF WORK. A servant assumes the risk of injury from an appliance whereby heavy electric motors were lifted and suddenly lowered by releasing a crank, causing the crank to revolve rapidly while still held by the employee, where it appears that he had worked with the appliance every day for two months, and knew of the danger and that a man had recently been injured by the rapid revolutions of the crank, there being nothing obscure or complicated about it (DUNBAR, J., dissents).

[1]Reported in 92 Pac. 451.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 6, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee of an electric company while removing a motor from the trucks of a street car. Reversed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

E. P. Dole and *J. E. McGrew*, for respondent.

Root, J.—Respondent was employed by appellant in its car barns, and a portion of his work consisted in removing to and from the trucks of its cars electric motors used thereon. The method of doing the work was something like this: By the side of the car track there was a derrick which had upon it a large shaft or drum, around which a cable was wound and extended along a crane to a pulley at the end thereof, which crane could be swung over the trucks of a car when they were brought upon the tracks to the side of said derrick. When it was desired to remove a motor from the trucks of a car, the cable was fastened to the motor and the latter was raised by the turning of a shaft or drum by means of a crank, or two cranks, one at either end. When the motor was suspended in the air, it would be held in such position by one or two men at the crank or cranks, while two other men would take hold of the motor and swing it to and fro until it was immediately over the place where it was desired to be placed, when, upon a signal, it would be quickly dropped by the man or men holding the crank releasing their resistance and letting the drum or shaft revolve backwards, keeping hold, however, of the handle to the crank. The mechanism of the apparatus was such that, when a motor was suspended in the air and the resistance was released, the crank would reverse very rapidly. The gearing was such that it took about eleven revolutions of the crank to raise or lower the motor a distance of one inch. Consequently, when a motor was permitted to drop suddenly, the crank would whirl with great rapidity.

At the time of the accident respondent and two other men were handling one of the largest motors used by the company. The evidence showed that it weighed 2,349 pounds and was, with possibly one exception, the largest size used by appellant. The next largest size weighed 2,100 pounds, the next 1,865, and there were several smaller sizes. Respondent testifies that he had never, prior to that time, assisted in handling one of the motors of this size, although he admits that he had handled the size next smaller. He says the appearance of the motors was such that he could tell which was the heavier. At the time in question the motor was raised by the respondent and a fellow workman named Beach, working at the crank. After it was suspended in air, one Regalia, who is alleged to have been a foreman in immediate charge of the work, called Beach to help him swing the motor so as to have it placed at the point desired. Respondent remained at the crank and held the motor in position while the other two men swung the same until it was immediately over the position where it was desired to be placed. The foreman then called out, "Let her go," and respondent immediately let the motor drop, as was customary in such cases. As he did so, the handle of the crank, upon which he kept his hand, flew around with great rapidity and struck him upon the head, causing a very serious injury.

Respondent had been working at this kind of work for two months. While working there, another workman had been injured in the same manner as he. On the witness stand he admitted that he had talked with the foreman two weeks before about this appliance being a dangerous one, and also admits that he had heard the foreman caution another workman about the dangers thereof. The case was tried to a jury, which returned a verdict in favor of the plaintiff, upon which judgment was entered in his favor. From this the present appeal is prosecuted. The defendant denied negligence and alleged contributory negligence and assumed risk as affirmative defenses.

The evidence was sufficient to justify a finding that the defendant was guilty of negligence, and we need not discuss that question. As to the defense, however, we think that the evidence of the plaintiff himself shows that he assumed the risk of the danger which occasioned his injury. He had worked in this position for two months. He had handled and worked about this appliance every day during that time, hoisting and moving about motors of various sizes. The work had been frequently done by three men. It was necessary for two of the men to steady and swing the motor when suspended in the air, in order to bring it over to the exact place where it was desired to be located. It is urged by respondent that he did not assume the dangers caused by the condition brought about when the foreman called Beach from the crank to assist in swinging the motor. The evidence shows that this was the method ordinarily followed. Respondent knew that probably either he or Beach would be so called.

It is urged that, as this was a heavier motor than respondent had ever lifted before, the foreman should have had an extra man there to help hold the crank, or that a ratchet or rope brake should have been employed, and that respondent should not have been left to lower the weight alone without these appliances. Respondent admits that he could tell by the looks of the motor that it was one of the heavy motors; that there was a difference in the size, the heavier being the more bulky. It also appears by his own testimony and that of his witnesses that the method by which this work was done required the lowering of the motor suddenly. When the two men swung it upon the chain suspended from the crane above, they did so in order to carry it over to the particular point where it was desired to be placed, and it was the custom and likewise a necessity to drop it quickly when that location was reached. This being true, it would make no difference whether there was one man or half a dozen holding the crank. The motor could not be dropped suddenly without the resistance upon the crank being suddenly released. This sudden release

of the sustaining force permitted the motor to drop, and necessarily caused the rapid revolution backwards of the shaft upon which the crank was attached. It is apparent, as plaintiff practically admits in his evidence, that a ratchet or rope brake would have been of no avail; and it would make little difference whether the motor weighed 2,400, 2,100, or 1,800 pounds.

There is no contention that respondent was unable to hold the weight of this motor. He did hold it, and apparently without any difficulty, until he received the signal to "Let her go." It was stated by witnesses, on the part of respondent, that two men could not have done this work that respondent was doing so readily as one, for the reason that it was necessary to release the resistance and lower the motor quickly, and that two men could not act exactly in unison. But if there had been two men and they had both complied with the order of the foreman instantly in accordance with the method by which the work was ordinarily done, the shaft would have revolved in exactly the same manner in which it did in this instance. The danger would have been exactly the same. There was nothing obscure or complicated about the crane or any of the appliances connected therewith. They were simple and well understood by the respondent.

It is not claimed that there was anything broken or out of repair. Respondent had handled motors in this same manner daily for two months and had observed the rapid manner in which the handle of this crank always flew around whenever a motor was dropped into position. Any one would know that the rapid whirling of this crank handle would seriously injure any one who should get in its way. Respondent, of course, knew this, and he also knew that another man had recently been injured thereby, and he had heard the dangers thereof spoken of and had himself discussed them. He knew the appliance was not equipped with a brake or ratchet. He knew that if by any mishap he should get in the way of the

handle of the crank when it was released, a serious injury must of necessity result. Knowing all of these things he continued in the work and unfortunately became a victim of the dangers which had for weeks been apparent to him. Under the circumstances of this case, the law is well established in this and other states that the injured workman cannot recover.

In the case of *Jennings v. Tacoma R. & Motor Co.*, 7 Wash. 275, 34 Pac. 937, this court said:

"It is claimed by the respondent that the rule that, where a servant enters upon employment, 'he assumes the usual risk and perils of the service,' as applied to the facts of this case, still gave the respondent the right to assume that the master had furnished him a safe and convenient place in which to perform the services required of him. That proposition is no doubt correct, but the assumption cannot be relied upon after actual knowledge to the contrary is brought home to the mind of the servant. The assumption will control only where the danger is not apparent. No sane man is expected to act on an assumption which he knows to be false."

In the case of *Brown v. Tabor Mill Co.*, 22 Wash. 317, 60 Pac. 1126, discussing the facts, the court said:

"It does not appear that any change was made in the position or condition of the shafting during the time that respondent was employed in the mill, nor that it was any more hazardous or dangerous to pass under it at the time the injury occurred than it was at any time previous thereto. . . . The motion for nonsuit should have been granted. The rule that an employee, on entering upon the duties of his employment, assumes all the risks incident to such an employment which are apparent and obvious and which he could by the exercise of common prudence avoid, is well settled in this state,"

citing numerous authorities. In principle we think it is impossible to distinguish the case at bar from the one just quoted from.

The case of *Trudeau v. American Mill Co.*, 41 Wash. 465, 83 Pac. 725, was one where the facts were very similar to those of this case. There the plaintiff was struck by a wrench

or crank attached to a shaft used to dump a load from a wagon. The case was stronger for the plaintiff, however, in that there the appliance was out of repair. It was claimed that the defendant had promised to remedy this defect and plaintiff was relying upon that promise when injured. But he knew of the defective condition and went ahead and attempted to dump a load of wood, when the shaft revolved rapidly and the handle of the crank or wrench struck him on the head, producing a serious injury. This court held that, as he knew the condition of the apparatus and the dangers which must necessarily come from a rapid revolving of the shaft when the load was dropped, he should have kept out of the way of injury, and the judgment of the lower court against him was affirmed. The injury to this respondent was one which strongly appeals to one's sympathy; but when we remember that he knew all about the appliance with which he was working and was familiar with the methods of the work and the dangers attendant thereupon, we cannot escape the conclusion that this case falls squarely within the rule of assumed risk. *Week v. Fremont Mill Co.*, 3 Wash. 629, 29 Pac. 215; *Olson v. McMurray Cedar Lum. Co.*, 9 Wash. 500, 37 Pac. 679; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Bullivant v. Spokane*, 14 Wash. 577, 45 Pac. 42; *French v. First Avenue R. Co.*, 24 Wash. 83, 63 Pac. 1108; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867; *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981; *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089, 109 Am. St. 917; *Tham v. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to dismiss the action.

RUDKIN, MOUNT, and CROW, JJ., concur.

DUNBAR, J., dissents.

[No. 6891. Decided November 22, 1907.]

GEORGE B. LITTLEFIELD, *Appellant*, v. THOMAS DAWSON *et al.*, *Respondents*.[1]

BROKERS—AUTHORITY TO SELL—CONTRACTS—CONSTRUCTION—SPECIFIC PERFORMANCE. A written authority to a broker giving exclusive power to sell certain described property and agreeing to convey the same to any purchaser designated, upon compliance with the specified terms, authorizes the broker to make a binding contract of sale which may be specifically enforced, where the agent's contract is clear and specific in its terms.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 25, 1907, upon sustaining a demurrer to the complaint, dismissing an action for the specific performance of a contract to convey real estate. Reversed.

James C. Moody, for appellant.

Perry & Hanson, for respondents.

HADLEY, C. J.—The trial court sustained a general demurrer to the complaint in this action, and the plaintiff refusing to plead further, judgment was entered dismissing the action. The plaintiff has appealed, and the sufficiency of the complaint is the sole question presented by the appeal. The complaint alleges that the appellant entered into a contract with the respondents through the latter's duly authorized agent, to purchase certain described lots in the city of Seattle, of which respondents were the owners. The contract executed by the alleged agent was in writing and as follows:

"Seattle, Washington, December 4th, 1906.

"Received from George B. Littlefield the sum of $500.00 being on account of the purchase price of lots 27, 28, 29, 30, block 8, Rainier Boulevard Addition, now owned by

[1]Reported in 92 Pac. 428.

Thomas Dawson, the purchase price of which is $17,000.00 the balance being payable as follows:

"$3,500.00 cash on delivery of deed, $4,000.00 in one year at 6 per cent. interest, $7,500.00 in three years at 6 per cent. interest, $1,500.00 according to a mortgage now on said property. All assessments may be assumed by purchaser, and if so assumed, to be deducted from the purchase price of $17,000.00.

"It is agreed that Thomas Dawson shall furnish an abstract of title to said property and in case title is not perfect and cannot be made perfect within a reasonable length of time, then this deposit shall be returned to George B. Littlefield, the purchaser. M. Francis Kane."

It is further alleged that the above contract of said agent was authorized by respondents through a contract in writing as follows:

"Nov. 5, 1906.

"To M. Francis Kane, In consideration of the sum of one dollar to me in hand paid and of the services to be performed by you in endeavoring to effect a sale of the property, described on the reverse side of this card, we do hereby give and grant unto you for a period of twenty days from date hereof, and thereafter until withdrawn by ten days written notice the exclusive right to sell said property, and we agree to convey the same, or cause the same to be conveyed by good and sufficient Warranty Deed to the person or persons designated by you. The price of said property to be $17,000.00 and upon the following terms: $4,000.00 cash, $4,000.00 one year, $9,000.00 at 6 per cent. three years, on or before, assessments to be assumed, and mortgage of $1,500.00 out of purchase price.

"We further agree in case of sale to furnish an abstract of title to said property, duly certified to date by a competent abstractor, and to pay you a commission of 5 per cent. upon the purchase price.

"Thomas Dawson,
"Catherine X Dawson. Owners.
"her mark."

On the back of the contract was indorsed the description of the property. It is alleged that respondents refused to com-

ply with their contract, and specific performance of the terms of the contract is sought.

It is stated in appellant's brief that the trial court based its ruling upon the decision of this court in *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471. If such was the case, it must have been the court's view that the authority of respondents' agent was limited to mere authority to find a purchaser, and that it did not include the power to make a contract for the sale which would bind respondents. A power may be insufficient to authorize an agent to convey real estate and yet it may be sufficient to authorize the agent to make a contract for the sale of it, specific performance of which will be enforced in equity. 1 Am. & Eng. Ency. Law (2d ed.), 1007.

The written authority to the agent in this instance conferred upon him the exclusive right to sell the property, and expressly recited that "We agree to convey the same or cause the same to be conveyed by good and sufficient warranty deed to the person or persons designated by you." If the authority to make a binding contract was not included within the terms of the agency, of what force are the above words? Their effect is to state that the principals thereby obligated themselves to convey to the person that should be designated by the agent and who should comply with the terms specified. The principals could not so obligate themselves unless the agent was at the same time authorized to carry over and connect this binding obligation with the purchaser and thus make it effectual. The very words of the written authority negative the idea that the principals were to be further consulted as to the personnel of the purchaser or otherwise, or that they were to ratify the acts of the agent before they would be bound. Their agreement was absolute to accept the purchaser the agent should designate and to convey to such purchaser upon his compliance with their specified terms. We find nothing in the case of *Carstens v. McReavy, supra*, inconsistent with the above views. The authority to the agent in that case was limited

to the power to negotiate a sale, and there was no provision in the contract of agency by which the principals bound themselves to convey to the purchaser that should be designated by the agent, as in the case at bar.

Appellant argues that the trial court in effect ignored the recent case of *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361. We do not see that that case is at all applicable here. It was simply held there that the statute, Laws 1905, page 110, chapter 58, means that the contract of agency must be in writing in order to sustain the recovery of commissions by the agent; but that it does not change the long-established rule that an agent may be orally authorized to make a contract binding upon his principal for the sale of lands. It was held that, if the agent so orally authorized shall himself execute a written memorandum or agreement concerning the sale, which, if executed by the principal, would be sufficient to satisfy the statute of frauds, it will support specific performance.

There is no inconsistency between the cases cited. In *Carstens v. McReavy* the court found that the final authority of the agent was in writing, but that the authority went no further than to confer power to find a purchaser. Under such circumstances the agent executed a written contract for the sale, attempting to bind his principal, and it was held that he exceeded his authority. In *Peirce v. Wheeler* the agent was not authorized in writing, but he procured an offer to purchase, accepted it subject to confirmation by his principal, received $500 on account of the cash payment, executed and delivered a written memorandum signed by himself, informed his principal what he had done, the principal approved the same, and the agent thereupon informed the purchaser of such approval. Under such circumstances the principal ratified the act of the agent in making the written contract for sale, and was estopped to thereafter urge lack of authority. In the case at bar, however, it seems to us that

all the ordinary elements necessary to satisfy the statute and to support specific performance clearly exist. The authority to the agent was in writing and empowered him to make a binding contract of sale. The agent followed this by a written contract for the sale which is clear and specific in its terms. It was therefore error to sustain the demurrer to the complaint.

The judgment is reversed, and the cause remanded with instructions to overrule the demurrer.

RUDKIN, DUNBAR, ROOT, MOUNT, and CROW, JJ., concur.

[No. 6861. Decided November 23, 1907.]

MITCHELL, LEWIS & STAVER COMPANY, *Respondent*, v. C. B. BEESON *et al.*, *Appellants*.[1]

PRINCIPAL AND SURETY—BOND GUARANTEEING LEASE—CONSTRUCTION—EXPIRATION OF LEASE—LIABILITY OF SURETIES. The sureties upon a bond guaranteeing the faithful performance of the lease of a steamer, on the part of the lessees, in which lease it was provided that the steamer should be kept free from liens and especially that it be delivered to the owners on the termination of the lease, are liable for the amount of liens accruing against the vessel after the termination of the lease, where the lessees failed to return the same to the owners as required by the lease; and it is immaterial that the place of the return was not designated.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 15, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon a surety bond. Affirmed.

Edgar S. Hadley, for appellants.

Shank & Smith, for respondent.

[1]Reported in 92 Pac. 426.

DUNBAR, J.—This is an action commenced by the respondent against C. B. Beeson, principal, and H. B. Brokaw and J. W. Garvin, sureties, on a bond executed by appellants in favor of respondent to guarantee performance of the conditions of a lease of a steamboat, made by the respondent to the appellant Beeson. On the 13th day of April, 1905, the respondent executed to and with the appellant Beeson a certain lease of said steamer, wherein, among other things, Beeson agreed to pay as rental for said steamer the monthly sum of $50 payable in advance. It was also agreed that he should keep the said steamer clear and free from liens, and at the end of the demised term of six months from the date of said lease, deliver said steamer to the respondent at such point on Puget Sound or the bays thereof as the respondent should designate. One clause of the contract of lease is as follows:

"The second party will forthwith furnish good and sufficient bond, with sureties satisfactory to the first party, in the penal sum of two thousand ($2,000) dollars, conditioned for the full, faithful and exact performance of this contract and of all its terms and conditions, and especially for the return of the said steamer as herein provided."

In accordance with the terms of the agreement, the appellants Brokaw and Garvin entered into an obligation in favor of respondent, reciting the conditions as follows:

"Whereas, the principal obligor is this day leasing from the obligee the steamer Transport, her tackle, apparel and furniture, by written contract of lease, and

"Whereas, the said lease requires that the lessee, principal obligor herein, shall furnish to the obligee this bond for the full and exact performance of all the terms and conditions of the said lease;

"Now, therefore, if the said principal obligor, and his assigns, shall fully, faithfully and exactly perform the said lease and all the terms and conditions thereof, and especially shall, at the termination of the said lease or at the end of the demised term or earlier termination, as in said lease provided, return the said steamer in the manner therein provided, it

being understood and agreed that the return of the said steamer in accordance with the terms and provisions of the said lease shall not of itself release and discharge this obligation; then this obligation shall be void, otherwise to remain in full force and effect."

Upon the execution and delivery of this bond, the plaintiff delivered to the defendant the said steamer Transport, her tackle, apparel and furniture, complete as she stood upon the ways in the city of Ballard. Instead of returning the steamer at the end of the six months, it was not returned until December 31, 1905. Certain claims for labor and liens had attached against the steamer before it was returned, and this action is brought to recover said claims and for reasonable rental after the expiration of the six months' term. The court found that the claims in the aggregate amount to $1,724.68, all of which were valid liens enforcible in admiralty on said steamboat, tackle, apparel, and furniture; that of the $1,899.68 demanded by plaintiff, besides interest and costs, made up of said sum of $1,724.68 and $175 for the use of the steamboat from September 13, 1905, the sum of $1,423.61 was for debts incurred by the defendant Beeson subsequent to the expiration of the demised term October 13, 1905, and that no new or different agreement other than the original contract had been made or entered into between the parties touching said steamboat or the retention thereof by the defendant Beeson. The answer of the defendant Beeson was to the effect that he had not been credited with certain tackle and apparel which he had placed upon the steamer and which had been retained by the plaintiff, the respondent here. The answer of the bondsmen appellants, Brokaw and Garvin, pleaded the same matter in relation to the furnishing of the tackle; admitted the execution of the bond, but alleged that the larger part of the claim sued upon was contracted after the expiration of said lease, to wit, the 13th day of October, 1905; that $1,423.61, the demand asked for in the complaint, was for obligations made after the expiration of said demised period, and

denied liability for such sum. Upon the trial the court entered judgment for the amount demanded, less a deduction made for the tackle and appliances which the respondent had the benefit of. The court also found that no demand had been made for the return of the boat by the respondent, the lessor, prior to its return. Judgment was entered for the sum of $1,638.04.

It is contended by the appellants that the bondsmen are not responsible for any violation of the lease contract after the term of six months had expired. It is hardly necessary to go into a discussion to determine whether this was a lease or a contract in bailment. Surety bonds will be construed as any other contract. They are contracts on the part of the sureties that they will stand good for the faithful performance of the contracts entered into by their principals. The bond is simply so much security for the faithful performance of the contract. This much is certain in this case, that if the terms of the contract had been complied with by the appellant, and the steamer returned according to the agreement, these liabilities would not have been incurred, and the steamer would not have been weighed down with incumbrances. So that it must necessarily follow that these elements of damage sued for result directly from a failure to return the boat at the end of six months as agreed, and the condition of the bond was a guaranty of the compliance with the contract, and especially for the return of the boat at the time specified. This condition is made prominent both in the lease and in the bond. There was an absolute agreement in the lease for the return of the steamer at the time specified, and that it should be kept free from liens. So that the only loophole of escape from the obligation is the claim that the respondent did not designate the particular spot or place where the steamer should be returned, notwithstanding the fact that no information on this subject was solicited by the appellant; and it does not appear that there was any controversy whatever on that subject, and

there is no indication from the findings that the want of designation of the point of reception was the cause in the slightest degree of the appellant's failure to comply with the terms of the contract in that regard.

It seems to us that it would be an exceedingly narrow construction to put on this contract that it was the duty of the respondent to designate the place of the return on the last day of the lease, or lose all benefits of the bond thereafter, and even according to appellant's contention, to lose all claim against Beeson alone for the payment of liens which he allowed to attach against the steamer subsequent to the expiration of the six months' term of lease. It is manifest that if it could not enforce a collection of such claims against the sureties, it could not enforce them against Beeson, for by the execution of the bond the sureties placed themselves in Beeson's shoes.

The case of *King County v. Ferry*, 5 Wash. 536, 32 Pac. 538, 34 Am. St. 880, 19 L. R. A. 500, cited and strongly relied upon by appellant, is not in point. What we held there was that, where the legislature had extended the term of office of an officer beyond the limit fixed by law at the time of his election and qualification, the sureties upon his bond could not be held liable for his official acts during such extended term; and while we found that there was an irreconcilable conflict of authority even upon that proposition, we adopted the view that, inasmuch as the term of office was fixed by law, the sureties could not be held reasonably to contemplate the unusual fact that the term would be extended; that from all the circumstances it could be gathered that it was not the intention of the parties to the contract to bind themselves beyond said fixed term, and that the bond like any other contract would be construed with reference to the intention of the parties. There the bond was for the faithful performance of the duties of the officer during the fixed term. But here not only is the obligation that certain things shall be done during the

term, but it is also a part of the obligation that the term shall cease at the time prescribed, and that the steamer shall be returned at such specified time. In the one case the termination of the office was absolutely beyond the control of the bondsmen or their principal. In the case at bar the termination of the lease was absolutely within their control, and was one of the essential things with reference to which they contracted.

The judgment is affirmed.

HADLEY, C. J., ROOT, MOUNT, and CROW, JJ., concur.

RUDKIN and FULLERTON, JJ., took no part.

[No. 6994. Decided November 25, 1907.]

GEORGE T. BALL, *by His Guardian etc., Respondent*, v. PETERMAN MANUFACTURING COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE OF MASTER—STARTING MACHINERY WITHOUT WARNING—EVIDENCE—SUFFICIENCY. Whether a sawyer was guilty of negligence in starting machinery without warning, whereby a log was rolled onto the plaintiff's hand while he was greasing a wedge as directed by the sawyer, is for the jury, where there was evidence that the plaintiff was acting as directed, and the log was rolled without warning him, and that the ropes controlling the machinery were twisted so that they could not be intelligently operated.

SAME — CONTRIBUTORY NEGLIGENCE — WARNING — YOUTHFUL EMPLOYEE. A seventeen year old boy is not guilty of contributory negligence, as a matter of law, in failing to get out of the way of a log, when he was standing with his back to the sawyer, greasing a wedge under one end of the log as directed, and the sawyer put the machinery in operation rolling the log without giving any warning.

DAMAGES—INJURIES—EXCESSIVENESS. A verdict for $2,500 for injuries from the crushing of two fingers of a seventeen year old boy, necessitating amputation of one of them, is excessive and should be reduced to $1,500.

[1]Reported in 92 Pac. 425.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered January 26, 1907, upon the verdict of a jury for $2,500 damages for personal injuries sustained by an employee in a sawmill. Affirmed on condition of remitting $1,000.

R. S. Eskridge and *Philip Tindall*, for appellant.
Govnor Teats, for respondent.

DUNBAR, J.—The respondent by his guardian brings this action for damages occasioned by an injury received while in the employ of appellant in its sawmill at Tacoma. From a judgment for the plaintiff in the sum of $2,500, this appeal is taken.

At the time of the accident a log, six feet in diameter and thirty feet long, was being moved across the log deck toward the carriage, by means of the chain and drum canting gear ordinarily used in sawmills for this purpose. It became necessary to move one end of the log around and, in order to prevent the other end from rolling at the same time, a wedge about two feet long and six by eight inches thick was used for that end of the log to roll against. It was the duty of the respondent to grease this wedge with tallow so that the log would revolve against it and slip back instead of climbing over the wedge while the other end was being pulled around. Respondent, being directed by the sawyer who was in charge to place the wedge near the end of the log and grease it, placed said wedge about a foot from the log and was greasing it with a lump of tallow, when the sawyer put the canting gear in motion and the log was pulled over upon respondent's hand, crushing one finger so that it became necessary to amputate it, and breaking and seriously injuring another finger. It is the respondent's contention that the sawyer rolled the log without giving notice, and that this action constituted the negligence which proximately occasioned the injury. Appellant claimed that the log was put in motion slowly, and that

the respondent required no warning, but could have readily protected himself had he been performing his work in a proper manner and been on his guard, and that the conduct of the respondent in the premises constituted contributory negligence as a matter of law.

Outside of the testimony of respondent and other witnesses, the witness Rinke testified that he was an eyewitness to the transaction; that the respondent had been called by the sawyer to perform the aforesaid duty; that the said sawyer had run the chain down and hooked it into the cable himself, and that, as he rolled the log over once, it was not coming quite right and he hallooed for Ball to put the wedge under the log, as he wanted to swing it around; that Ball, in answer to this command, placed the wedge on the skid and began to grease it; that the sawyer had hold of his ropes, a ring in each hand, and that the ropes, instead of being held so that they could be operated intelligently, were twisted; that the canting gear started up and pulled the log over and caught the end of the boy's finger, and he began to halloo; and that the sawyer, in attempting to release him, pulled the wrong rope and pulled the log up onto his hand the second time. Under the uniform decisions of this court under such testimony, the question of whether or not the sawyer, in starting the canting gear without warning and in the manner in which he did start it, was guilty of negligence is a question of fact to be determined by the jury.

As to the second proposition, viz., the alleged contributory negligence of the respondent, it seems to us that the record fails to show contributory negligence as a matter of law. This was a boy seventeen years old, working under the express direction of the sawyer, working in a place which was prepared by the appellant, and which it presumably did not regard as necessarily dangerous if the sawyer did his duty in notifying the person who was working there. The testimony shows that the boy was working with his back to the sawyer, and that the sawyer was standing facing the boy,

but a few feet away. Under all the circumstances shown by the testimony it does not appear that the respondent was guilty of contributory negligence.

It is also contended that the amount of the verdict in this case was excessive, and as compared with verdicts which have been sustained in other cases where the injuries were incomparably greater, we think this contention ought to be sustained. The judgment will be affirmed on condition that the respondent remit the sum of $1,000 from the judgment obtained. Otherwise the judgment will be reversed and a new trial granted.

HADLEY, C. J., RUDKIN, MOUNT, and CROW, JJ., concur.

[No. 6340. Decided November 25, 1907.]

MARIE CARRAU, *Respondent*, v. UNITED STATES FIDELITY & GUARANTY COMPANY, *Appellant*.[1]

COSTS—SECURITY FOR—POWER TO REQUIRE—COURTS—JURISDICTION. A cost bond filed pursuant to the order of the Federal court is not void because of the fact that the action was dismissed for want of jurisdiction over the subject-matter of the action; as the Federal court has jurisdiction to render a judgment for costs in such a case; and power to require security for costs is incident to the court's power to render judgment for costs.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 18, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a cost bond. Affirmed.

Samuel H. Piles, George Donworth, James B. Howe, and *Charles H. Farrell* (*Walter S. Fulton*, of counsel), for appellant.

J. W. Robinson, for respondent.

[1]Reported in 92 Pac. 424.

RUDKIN, J.—Sometime prior to the 24th day of October, 1901, Hannah O'Callaghan and Edward Corcoran, as complainants, instituted a suit in equity in the Circuit Court of the United States for the District of Washington, against Terence O'Brien, as administrator of the estate of John Sullivan, deceased, and Marie Carrau as defendants. That court, on application of the defendant Carrau, made an order requiring the complainants to execute a cost bond in her favor in the sum of $400. Pursuant to this order the bond now in suit, executed by the defendant herein, was, on the above date, filed in the Circuit Court. The suit in which the cost bond was given was thereafter dismissed for want of jurisdiction, and a judgment for costs rendered against the complainants in the sum of $2,619.90. The present action was brought on the cost bond, and from a judgment in favor of the plaintiff, the defendant has appealed.

While three errors are assigned by the appellant, they present but a single question; namely, was the cost bond void because given pursuant to an order of the Circuit Court of the United States in a cause of which that court had no jurisdiction? In other words, the appellant contends that because the Circuit Court had no jurisdiction of the subject-matter of the suit it had no jurisdiction to require the complainant in that suit to give security for costs. We do not think that this conclusion follows. Independent of the fact that the judgment for costs was given in the Circuit Court in the suit in which the cost bond was filed, in obedience to the mandate of the Supreme Court of the United States, it is well settled that a party who brings or removes into the Circuit Court of the United States a case not within its jurisdiction is liable for the costs, and that the Circuit Court has jurisdiction to render judgment therefor. *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528; *Martin v. Snyder*, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup.

Ct. 654, 38 L. Ed. 511; *Hanrick v. Hanrick*, 153 U. S. 192, 14 Sup. Ct. 835, 38 L. Ed. 685; *Postal Telegraph Cable Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; *Pellett v. Great Northern R. Co.*, 105 Fed. 194; *Carrau v. O'Calligan*, 125 Fed. 657; Freeman, Judgments (4th ed.), § 120.

And we are of opinion that the power of the court to require security for costs is an incident to its power to render judgment for costs, rather than an incident to its jurisdiction over the subject-matter of the action. If it be conceded that the Circuit Court had jurisdiction to render judgment for costs against the complainants, *after the costs were incurred*, we think it necessarily follows that it had jurisdiction to require security for such costs *before they were incurred*. Furthermore, whether the Circuit Court had jurisdiction of the subject-matter of the action or not, it unquestionably had authority to stay proceedings and refuse to proceed further until a cost bond was given. By giving the cost bond the complainants were enabled to invoke the jurisdiction of the Circuit Court, and prosecute their claim to the Supreme Court of the United States, imposing costs on the defendants far in excess of the amount of the cost bond, and we think the appellant should now be estopped to deny either the validity of the bond or the authority of the Circuit Court to exact it.

We find no error in the record, the judgment is affirmed.

HADLEY, C. J., FULLERTON, DUNBAR, MOUNT, CROW, and ROOT, JJ., concur.

[No. 6943. Decided November 25, 1907.]

Mary Elhart, *Appellant*, v. Pacific Mutual Life Insurance Company, *Respondent*.[1]

Insurance—Life Policy—Defenses—Waiver of Forfeiture—Demanding Proof of Loss. Although proofs of death showed that the deceased was killed while engaged in a prohibited occupation contrary to the provisions of the policy, refusal to accept the proofs because not made on the prescribed forms, and the sending of blank forms, does not waive the right of the company to deny liability on account of such violation of the policy, where the forms sent contained express provision that no waiver of such defense should arise from the furnishing and delivery of the blanks.

Appeal from a judgment of the superior court for Pierce county, Linn, J., entered December 3, 1906, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on a life insurance policy. Affirmed.

Boyle, Warburton, Quick & Brockway, for appellant.

Hudson & Holt, for respondent.

Root, J.—This action was brought to recover on a policy of insurance issued by the respondent to the appellant on the life of her son, Arthur Guy Elhart. The policy contained the following provision:

"All insurance approved by this policy is based upon the written and printed application therefor, which is made a part of this contract, a copy being annexed hereto."

Said application contained the following provision:

"That no policy shall be valid if during the first year following its date I engage in any of the following extra hazardous occupations or employments; . . . service upon any railroad train or track as engineer, fireman, brakeman, freight conductor, . . . unless written permission is first expressly granted by the company."

[1]Reported in 92 Pac. 419.

The assured died within a year from the issuance of the policy, being killed while working as a fireman upon a railway locomotive, without permission from the insurance company. Appellant consulted one E. E. Rosling, an attorney, who caused a request to be made at respondent's local office for blank proofs of death. The cashier in said local office thereupon wrote to the secretary of the company in San Francisco, mentioning the request of said Rosling, and stating in his letter as follows:

"I understand that Mr. Elhart was a locomotive fireman and was scalded to death by the crown sheet burning out. . . . I am not able to find out very much from Mr. Rosling, but if you find everything in order and you will forward claim blanks, I will see that they are properly taken care of."

Upon receipt of this letter, the home office sent to its local agent, to be delivered to Mr. Rosling, the blanks requested by him. These blanks contained thereupon the following provisions:

"The company in furnishing and the claimant in receiving and using this blank expressly stipulate that the company does not thereby waive any right theretofore had to consider and determine any question as to its liability under any policy, the question of liability of the company being without prejudice or presumption by reason of the delivery hereof and especially as to whether Arthur G. Elhart during the first year following the date of policy engaged in service upon any railroad train or track as engineer, fireman, brakeman, freight conductor, or trackman, or in switching or in coupling or uncoupling cars,"

the latter part of said matter being written in with a pen. Mr. Rosling received said blanks and forwarded them to appellant with a letter containing the following matter:

"Enclosed find proofs of loss to be executed by yourself. . . . When the company turned over this blank to me today I noticed the interlineation that they have made in relation to their not waiving any rights they may have to protest the policy by reason of Arthur's employment on the

railway. It is very evident that the company proposes to fight this claim."

A few days thereafter appellant wrote to respondent and inclosed an affidavit of which the following is a copy, aside from formal parts:

"Mary Elhart, being first duly sworn, on oath deposes and says: That she is the mother of Arthur Guy Elhart, who was insured in the Pacific Mutual Life Insurance Company of California in Policy No. 68,746, dated August 11th, 1904, for the sum of $1,000, and also the beneficiary in said policy; that Arthur Guy Elhart died on the 10th day of August, 1905, at North Yakima, Washington; that his death was occasioned by the explosion of a boiler on an engine operating cars on the N. P. Railway, upon which he was employed as fireman."

To this respondent's secretary answered, calling appellant's attention to the "general provisions" of her policy, which required that proofs of death should be made upon the forms prescribed by the company, and also informed her that blanks had been sent to attorney Rosling, and making this statement:

"However, we will inclose you herewith a duplicate set bearing on the first and last pages an endorsement similar to the one quoted in the foregoing portion of this letter;"

the endorsement referred to being the provision that the company did not waive any right to consider and determine any question of its liability as hereinbefore set forth. The appellant then prepared her proofs upon the blanks furnished by the company, and sent them in, erasing with red ink the provision in regard to the company not waiving any rights by reason of delivery of said blanks for proof. The company denied liability upon the policy on account of the deceased having engaged within a year in a prohibited occupation contrary to the terms of the policy. The trial in the superior court resulted in a judgment in favor of the defendant company. From this an appeal is prosecuted.

It is the contention of the appellant that, when the company refused to accept the affidavit of appellant as proof and wrote to her calling attention to the provisions of the policy requiring the death proof to be made upon blanks furnished by the company, this constituted a waiver on the part of the company of its right to declare a forfeiture of the policy or to interpose the defense that the deceased had violated its terms. She urges that the company, before sending the second set of blanks, knew that the deceased had met his death while engaged in an occupation prohibited under the terms of the policy, and that the sending of this set of blanks was in effect a demand upon her to do something to perfect her claim, and was sufficient to justify her in believing that it waived any defense it might have on account of the occupation and manner of death of the assured.

We are unable to uphold this contention. Ordinarily a waiver is an intentional release of some right, and it is generally held that provisions of this character in insurance policies are deemed to be waived only when an intention to waive is apparent, or where the conduct of the company is inconsistent with an intention to declare a forfeiture, or has placed the other party at a disadvantage, or gained for itself an advantage which it should not in justice and good conscience be permitted to assert. In the facts as shown by this record we see no evidence of any intention on the part of the respondent to waive its right to defend against this policy. We see nothing in its conduct calculated to mislead the appellant or take any advantage of her. She received the first set of blanks. For reasons which do not appear she did not use them but sent to the company an affidavit prepared by herself or her attorneys setting forth the facts concerning her son's death. The home office, not knowing that she had received the first blanks sent and evidently supposing that she had not, sent her a duplicate set containing the same notice as to the company not waiving any of its rights by reason

of the occupation and manner of death of the deceased. It seems to us that this on the part of the company was a matter of courtesy that could not, in any reasonable manner, be construed into a waiver on its part. *Hopkins v. Northwestern etc. Ins. Co.*, 41 Wash. 592, 83 Pac. 1019; *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387; 29 Am. & Eng. Ency. Law (2d ed.), 1093, 1105-1108; 16 Am. & Eng. Ency. Law (2d ed.), 935-939; *Ronald v. Mutual Reserve Fund Life Ass'n*, 132 N. Y. 378, 30 N. E. 739; *Wheaton v. North British & M. Ins. Co.*, 76 Cal. 415, 18 Pac. 758; 2 Bacon, Benefit Societies and Life Insurance (3d ed.), §§ 421-424; 2 May, Insurance (4th ed.), § 505.

Finding no error in the judgment of the superior court, the same is affirmed.

FULLERTON, RUDKIN, and MOUNT, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 6949. Decided November 25, 1907.]

SAMUEL JONES, *Respondent*, v. JAMES D. HOGE, *Appellant*.[1]

HIGHWAYS—AUTOMOBILES—INJURIES TO TRAVELERS. An automobile is not such a dangerous agency as to render the owner liable to travelers in the highway for injuries inflicted therewith by a servant irrespective of the scope of the employment, and merely because the owner has made it possible for the servant to take out the machine at his pleasure.

MASTER AND SERVANT—INJURY TO THIRD PERSON—NEGLIGENCE OF SERVANT—SCOPE OF EMPLOYMENT. The owner of an automobile is not liable to one who was run over by his incompetent chauffeur, where the machine was being operated without the knowledge or authority of the owner on a personal errand of the servant; since the act was not within the scope of the servant's employment.

[1]Reported in 92 Pac. 433.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 16, 1907, upon granting plaintiff's motion for a new trial, after sustaining defendant's challenge to the sufficiency of the evidence and motion for judgment, in an action for personal injuries sustained by a pedestrian by being run over by an automobile. Reversed.

Kerr & McCord, for appellant.

Jas. F. McElroy and *A. A. Booth*, for respondent.

Root, J.—Respondent commenced this action to recover damages for personal injuries sustained by reason of being run over by defendant's automobile, operated by one Barnes as chauffeur. The evidence showed that Barnes was employed by defendant to operate and care for his automobile, and to take the same to and from defendant's home whenever ordered so to do by himself or wife. The machine was kept at a public garage, and Barnes was authorized to take the same therefrom whenever appellant or wife so directed, and to do so without making any request of the owners of the garage. At the time of respondent's injury, Barnes had taken out the automobile without the knowledge or permission of either defendant or his wife, and was using the machine on an errand personal to himself. He had been advised that neither the defendant nor his wife required the machine that evening, and his errand was one with which his employer was in no manner concerned. At the close of the evidence at the trial, a challenge to the sufficiency of the evidence and a motion to withdraw the case from the jury and enter judgment for defendant was made, and sustained by the court. Thereafter a motion for new trial was granted by the court solely upon the ground that the evidence tended to show that Barnes was not a competent and careful operator of an automobile, and was entrusted with its care, and having by his negligence injured an innocent person, his employer was liable for damages.

It is contended by respondent that an automobile is a machine of such danger as to render the owner thereof liable for injuries caused thereby, while operated by his chauffeur, and even though not engaged directly in his line of employment, if the master has made it possible for the chauffeur to take out and operate such machine at pleasure; that the master is holden to employ only such chauffeurs as are competent and careful, and must be holden for damages occasioned by their incompetency or recklessness when making use of the machine, even though out of the line of employment; and also that in this case Barnes was within the apparent scope of his authority. We do not think the contentions can be upheld. Barnes was not using the machine to carry out any purpose for which he was employed. We do not think that an automobile can be placed in the same category as locomotives, gunpowder, dynamite, and similarly dangerous machines or agencies. It is true that the operation of this machine is attended with some dangers not common to the use of the ordinary vehicle, and we believe and have already held that those who operate these machines must be held to that degree of care which is commensurate with the dangers naturally incident to their use. *Lampe v. Jacobsen*, 46 Wash. 533, 90 Pac. 654. But wo do not believe that the law would charge the owner of an automobile with a liability for damages caused by the operator thereof under the circumstances found here.

In the case of *Robinson v. McNeil*, 18 Wash. 163, 51 Pac. 355, this court held that, where a section foreman who had charge of a hand-car which he used to travel over the road, loaned the same to some boys, one of whom was thereby injured, the railway company was not liable as the foreman was not authorized to permit the hand-car to be used for such a purpose.

Huddy, on The Law of Automobiles, page 15, says this:

"The motor carriage is not to be classed with railroads, which, owing to their peculiar and dangerous character, are

In the case of *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161, the syllabus reads as follows:

"A chauffeur who in violation of the instructions of his employer takes out the latter's automobile for his own pleasure is not, in so doing, acting within the scope of his employment, and his employer is not responsible to strangers for his negligence."

In the case of *Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, the court said:

"The law does not denounce motor carriages, as such, on the public highways. For so long as they are constructed and propelled in a manner consistent with the use of highways, and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travelers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads. Because novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to seeing them, is no reason for prohibiting their use. In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road."

In *Morier v. St. Paul etc. R. Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793, the court said:

"The universal test of the master's liability is whether there was authority expressed or implied for doing the act; that is, was it one done in the course and within the scope of the servant's employment. If it be done within the course of and within the scope of his employment, the master will be liable for the act, whether negligent, fraudulent, deceitful, or an act of positive malfeasance. . . . But a master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the

servant steps outside of his employment to do an act for himself not connected with the master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. The master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him and does not happen in the course of his employment, and in determining whether a particular act is done in the course of the servant's employment, it is proper, first, to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself and as his own master *pro tempore*, the master is not liable."

In the case of *Reynolds v. Buck*, 127 Iowa 601, 103 N. W. 946, the court used this language:

"Conceding for the purposes of this appeal that the son was negligently operating the machine at the time of the accident, was such negligence chargeable to the defendant under the evidence? We are clearly of the opinion that it was not. The direct evidence all shows that his use of the electric automobile was solely for the pleasure and convenience of the young lady and himself, and that it was in no way or sense connected with his employment or the defendant's business. . . . The son had been given a holiday, and was master of his own time on that day. This is conclusively shown. The defendant had ordered the machine put away and did not know that his son wished or intended to use it. It was taken and used for the son's own pleasure, and we think the verdict was very properly directed for the defendant."

In the case of *Berman v. Schultz*, 84 N. Y. Supp. 292, where defendant's driver left an automobile temporarily, and a third person started the machine, causing an injury, the court said:

"It was not the duty of the defendant to chain the machine to a post or in some way fasten it, so that it was impossible

for it to be started by the act of a third person. The law did not impose upon the defendant a degree of care that made the starting of the machine impossible."

In the case of *Clark v. Buckmobile Co.*, 107 App. Div. 120, 94 N. Y. Supp. 771, this was said:

"Birdsall was the general manager of defendant while engaged in its business. . . . Davis was an employee of the defendant while engaged in its business, but when not so engaged he did not represent the defendant. These two men were in charge of the machine when the accident occurred. Davis was running it and Birdsall was giving more or less direction with reference to its movements. Neither of them was engaged in defendant's business, however. They did not represent the defendant, and it was not and is not liable for any negligence they were guilty of which caused plaintiff's injuries. Suppose they had taken a day off for pleasure and had borrowed or leased the machine from the defendant to enable them to enjoy their outing; would the defendant be liable for any injuries resulting from their negligence in operating the machine while they were out upon the road? Suppose after business hours any day they had borrowed or leased the machine from the defendant to enjoy a few hours' run across the country for their own pleasure, would the defendant be liable for any injury caused by their negligently operating the machine while they were out? It is quite apparent that in the cases suggested no liability of defendant would result. The reason is, that in order to establish liability, the persons must not only be generally employees of the defendant, but must be employed in the defendant's business, and not merely in their own recreation and pleasure at the time the injuries are caused."

Thompson on The Law of Negligence Vol. 2, § 525, employs this language:

"The rule, moreover, implies that the master will not in any case be liable for wrongs committed by the servant while not acting about the master's business, or, what is substantially the same thing, while not acting within the scope of his authority. This rule is so reasonable that the ground on which it rests need scarcely be suggested. In all the affairs of life men are constantly obliged to act by others, but no

one would venture so to act, if the mere circumstance that he employed another to act for him about any general or particular business, made him an insurer against a wrong which such person might possibly commit during the period of such employment. The law does not even put a father under such onerous responsibility in respect of torts of his minor children. . . . But in other cases, where the relation of master and servant subsists by virtue of a contract, and the servant instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant; and the maxim *qui facit per alium facit per se* does not apply. In other words, if the servant steps aside from his master's business for how short a time soever, to commit a wrong not connected with such business, the relation of master and servant will be taken to have been for the time suspended, and the act will not be treated as the personal act of the servant, and he alone will be responsible for it."

We think an examination of these and other authorities shows that the defendant in this case was not liable, that the motion for judgment was properly granted, and that it was error to set the same aside and grant a new trial.

The judgment of the honorable superior court is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

HADLEY, C. J., RUDKIN, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 6953. Decided November 25, 1907.]

ADOLPH HAMMER, *by His Guardian Ad Litem, Amelia Anna Hammer, Respondent*, v. ELMER E. CAINE, *Appellant.*[1]

INFANTS—PERSONAL INJURIES—LOSS OF TIME—EMANCIPATION—JUDGMENTS—RES JUDICATA. In an action for personal injuries by a minor by his mother as guardian *ad litem*, he may recover for his loss of time since the suit therefor emancipates him; and his mother would be estopped from making claim therefor and concluded by the judgment, although the items were not specifically stated in the complaint, if they were submitted by the charge to the jury.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 18, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by the negligent operation of an automobile. Affirmed.

Chas. F. Munday, Walter S. Fulton, and *James A. Kerr*, for appellant.

Albert D. Martin and *Blaine, Tucker & Hyland*, for respondent.

ROOT, J.—Respondent, a minor, prosecuted this action by his mother as guardian *ad litem*, to recover damages for personal injuries received through the negligent operation of an automobile owned by appellant, and from personal conduct of appellant toward him at the time of the collision. From a judgment for $1,800 in respondent's favor, this appeal is taken.

The claim for damages was set forth in the complaint in these words:

"That by reason of the facts aforesaid the said Adolph Hammer has been made to suffer great bodily pain and mental

[1]Reported in 92 Pac. 441.

anguish, and has suffered great humiliation, chagrin and insult on account of the acts aforesaid, and has been on account thereof, made sick, lame and sore, and has been, and now is, confined to his bed, and will be indefinitely, and has been and is, on account thereof, permanently injured and will never be able to follow the avocation heretofore pursued by him, and on account thereof has been required to employ a physician and surgeon in an effort to undertake to cure the injuries so sustained as aforesaid and to relieve the pain and suffering on account of said injuries, and the said plaintiff has been damaged thereby in the sum of twelve thousand dollars ($12,000)."

Appellant urges that this does not contain any claim for loss of time or earnings during appellant's minority. He requested the trial court to charge the jury that they could allow nothing for such loss. The court refused, and instructed the jury that they might award such sum as would compensate him for any loss of time or earning capacity. Appellant insists that this is error, as respondent's mother was entitled to his time and earnings during his minority, and that she had not waived her right thereto. Respondent contends that the prosecution of the action by the mother as guardian *ad litem* estops her from hereafter making any claim against appellant for these items. We think, under former holdings of this court, that this contention must be upheld. The rule announced in *Daly v. Everett Pulp and Paper Co.*, 31 Wash. 252, 71 Pac. 1014, as interpreted and followed in *Donald v. Ballard*, 34 Wash. 576, 76 Pac. 80, would seem to be conclusive upon this point. In the former case the following language was employed:

"In view of appellant's participation in the suit, his consent to the judgment and his receipt of the fruits thereof as guardian for the son, we think he should not now be heard to say that he has a demand of his own which was not included in the above suit and judgment. It must be held that he emancipated his son, in so far as the right to recover damages was concerned, and permitted him to recover all damages accruing by reason of the accident, including those pertain-

ing to the period of minority, as well as those relating to the time beyond minority. It is true that the earnings of a minor belong to the father unless the father has given them to him. But the father cannot recover for such earnings when he has emancipated the minor. That appellant is estopped to recover in this action is sustained by the case of *Baker v. Flint & P. M. R. R. Co.*, 91 Mich. 298, 51 N. W. 897, 30 Am. St. 471, 16 L. R. A. 154."

In the *Donald v. Ballard* case, this was said:

"It was held that, under such circumstances, the father has emancipated his son in so far as the right to recover damages which were included in the son's suit is concerned. Such is the case here. That the father consented to this recovery by the son is manifest, since he himself caused the action to be brought in his own name as guardian *ad litem*, and specifically included the item of damage here under discussion."

If in the case at bar the items were not specifically mentioned in the complaint, they were nevertheless submitted by the court's charge to the jury, and the judgment upon the verdict must be conclusive against the mother as to those matters.

The judgment is affirmed.

HADLEY, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

RUDKIN and FULLERTON, JJ., took no part.

[No. 7020. Decided November 25, 1907.]

FRANK E. CASE, *Respondent*, v. ROBERT PERRIGO *et al.*, *Appellants*.[1]

FRAUDS, STATUTE OF—SALE OF REAL PROPERTY—PART PERFORMANCE—SUFFICIENCY—SPECIFIC PERFORMANCE. There is no such substantial performance of an oral contract for the sale of land as to take the same out of the operation of the statute of frauds, where it appears that the vendee was to discharge a mortgage and give a second mortgage within ten days, which he neglected to do, except to pay interest and a small part of the principal and taxes for several years, that he cut timber on the land without the owner's consent, receiving net profits sufficient to discharge the mortgage, and that after seven years he took possession by stealth without the owner's consent, after deed made to another; since the vendee is not in a position to demand specific performance.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 30, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover possession of real property and to quiet title. Affirmed.

Solon T. Williams, for appellants.

James Kiefer, for respondent.

HADLEY, C. J.—This is an action to recover possession and to quiet title to real estate. The facts found by the court within the issues, and which we find sustained by the evidence, are as follows: On the 3d day of April, 1906, Warren W. Perrigo, then holding title in fee simple to the property in question, conveyed the same to one Pennicook, as security for a prior loan amounting to a sum between $400 and $500. Thereafter, on June 19, 1906, said Pennicook and his wife conveyed the premises to this plaintiff, and for the title so transferred, the plaintiff paid a consideration of $2,000, the same being paid to said Warren W. Perrigo, and the latter

[1]Reported in 92 Pac. 432.

paid therefrom to said Pennicook a sum sufficient to extinguish his indebtedness to Pennicook. On the 6th day of April, three days after the aforesaid deed was made to Pennicook, the defendant Robert Perrigo, a nephew of Warren W. Perrigo, at night and without the latter's consent or knowledge, moved upon said premises a small board shack, ten by twelve, formerly used as a bunk house in a lumber camp, and on the next day he occupied the same with his family. Soon afterwards he moved upon the premises another shack of similar description, twelve by fourteen. Both shacks were set upon blocks, being temporary structures readily removable from the premises. Robert Perrigo moved the shacks upon the premises under an alleged claim of right, by virtue of a parol agreement made between himself and his said uncle in the year 1898, whereby the nephew agreed to pay the mortgage indebtedness, then a lien upon the premises for the sum of $490, and the uncle agreed that, upon the payment thereof, he would convey the premises to the nephew. Subsequently it was agreed orally between them, in addition to the above, that the nephew should, within ten days thereafter, execute to the uncle a second mortgage upon the premises for $300, and the uncle should then execute a deed to the nephew. The nephew failed to execute the second mortgage.

Between the years 1898 and 1905 the nephew cut and removed from the land quantities of timber for which he received the net sum of about $700. This was without the consent of the uncle and without his knowledge until after the timber was cut. The nephew paid the taxes upon the land for the years 1897 to 1902, inclusive, paid the interest upon the said mortgage to September, 1905, procured an extension of time for payment, and paid $40 on account of the principal. In March, 1906, the uncle paid the balance of the principal of the mortgage, the amount being $450. He also paid the taxes upon the property for the years 1903 to 1905, inclusive, the taxes for 1903 and 1904 being then delinquent. About the

same time he placed lumber upon the premises with the intention of building thereon, and thereupon the nephew moved the shacks upon the premises in the manner hereinbefore stated, and he has since lived in them with his family. Neither the plaintiff nor his agents had any actual notice of the acts and claims of the nephew at the time the plaintiff purchased the premises, but both he and his agents relied upon the records of the auditor's office of King county, in which county the land is situate. Such records disclose no title in said nephew or claim of any kind upon his part. From the foregoing facts the court concluded that the nephew and his wife, the defendants herein, have no right or interest in the premises in controversy, and that the plaintiff is entitled to a decree quieting his title against the claims of the defendants, and also to a judgment for possession. Such a decree was accordingly entered, and the defendants have appealed.

The appellants' claim is based entirely upon an oral agreement which they allege has been performed to such an extent that the agreement is not affected by the statute of frauds. We cannot agree with this contention. The test of appellants' right to relief here is whether they are in a position to demand specific performance. Manifestly they are not in such position. They have signally failed to comply with the terms of the oral agreement. For a period of seven years they failed to discharge the mortgage upon the land for $490, and in all that time they reduced the principal by the sum of $40 only. They failed to execute to the uncle a second mortgage upon the land for $300 within ten days, or at all, a condition precedent under the agreement to their right to demand a deed. There has been a remarkable failure to perform appellants' part of the oral agreement. Part performance of such an agreement is insufficient to entitle one to relief, unless the part performance includes substantially what is in his power to perform. *Anderson v. Schneider*, 22 Wash. 363, 60 Pac. 1125. It must be such that to refuse specific performance of the contract would amount to a fraud upon the purchaser.

Borrow v. Borrow, 34 Wash. 684, 76 Pac. 305; *Johnson v. Upper*, 38 Wash. 693, 80 Pac. 801.

Appellants were not only largely delinquent in the performance of their obligation under the agreement, but in addition to that they, without their uncle's consent, removed timber from the land to their profit in the sum of about $700. After all these circumstances had transpired, they stealthily, and without the uncle's consent, went into possession. Such was the possession they held at the time respondent purchased the land. Respondent had no actual knowledge of the possession. But even if he was chargeable with notice of the open possession, as appellants contend, still it is not such possession as they are entitled to maintain as against either respondent's grantor or himself.

We think further comments are unnecessary to show that the trial court was right in its determination of the case. The judgment is affirmed.

MOUNT, ROOT, CROW, and DUNBAR, JJ., concur.
FULLERTON and RUDKIN, JJ., took no part.

[No. 6900. Decided November 26, 1907.]

J. CONNARD REIFF, *Respondent*, v. T. COULTER *et al.*, *Appellants*.[1]

APPEAL — PARTIES ENTITLED TO APPEAL — INTERVENERS — JOINDER. Interveners, whose affirmative answer was denied and who introduced no evidence in support of it, can derive no benefit from joining in an appeal by the defendant, where their interests were entirely adverse to the defendant's interest.

TRIAL — RECEPTION OF EVIDENCE — REOPENING CASE — DISCRETION. Where plaintiff rested after introducing certain evidence and the defendant declined to offer evidence, the oral announcement by the court that, while in grave doubt upon certain points, it would find for the defendants, does not prevent the court from reopening the

[1]Reported in 92 Pac. 436.

case for further testimony by the plaintiff, two days later, on due application and notice, before entry of formal judgment; the opening of the case being discretionary under such circumstances.

VENDOR AND PURCHASER—CONTRACT—MODIFICATION—ESTOPPEL TO ASSERT—RESCISSION. Where a written contract for the sale of real estate provided that if the title was not perfect, $500 paid on the purchase price should be returned, the vendee, after suit brought for the recovery of the $500 on the ground of defect in title, and receipt of payment of the judgment therefor, is estopped to assert that the written contract was changed by a verbal agreement to perfect the title, and that the suit was only a friendly suit to determine whether the title was perfect.

APPEAL—REVIEW—RESERVATION OF GROUNDS—TRIAL—REOPENING CASE. Where a case is reopened for further testimony on the part of the plaintiff, defendants cannot allege error in hearing testimony only on the part of the plaintiff, in the absence of any request by defendants to introduce evidence.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 30, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Chas. E. McAvoy, Harry E. Warner, and *John W. Roberts,* for appellants.

Byers & Byers and *Henry Howard, Jr.,* for respondent.

HADLEY, C. J.—This is an action to quiet title to real estate. The complaint alleges that the plaintiff is the owner in fee simple of the land, and that the Battery Street Methodist Episcopal Church, of Seattle, is a corporation. It is averred that the plaintiff received his title to the land from said corporation, and allegations are also made concerning the details of the manner in which the corporation both received and conveyed its title. It is alleged that the title of the corporation came through certain trustees to whom the property had been conveyed for the use of the ministry and membership of the "Methodist Episcopal Church in the United States of America." After charging that the defendants in the action claim some interest in the land without right, the prayer of

the complaint is that the plaintiff shall be adjudged to be the owner free and clear from all claims on the part of the defendants.

The defendants John W. Roberts and wife answered separately, making certain admissions and denials, and affirmatively alleging the following facts: On the 28th day of September, 1905, the plaintiff and the defendant John W. Roberts entered into a contract in writing, by the terms of which Roberts agreed to purchase the premises described in the complaint for the price of $9,000, and at the time of the execution of the agreement Roberts paid the plaintiff the sum of $500 as part of the said purchase price. It was expressly provided in the contract that the plaintiff was to convey the property to Roberts free and clear of all incumbrances and liens of every kind, and the plaintiff was to furnish an abstract of title down to date, showing a perfect title to be vested in plaintiff. The plaintiff furnished an abstract, and the answer avers that it did not show a perfect title, or any title, in plaintiff.

When the abstract was furnished, Roberts examined it and claimed that there were defects in the title. It is alleged that, after some conferences between the parties, it was mutually agreed that a friendly suit should be instituted to determine whether the abstract furnished did, or did not, show a perfect title in the plaintiff, it being agreed that, if such should be determined in favor of the plaintiff, then the conveyance should be completed according to the terms of the aforesaid contract, and if determined in favor of Roberts, then the plaintiff should proceed to perfect his title, and when perfected should convey to Roberts a perfect title; that such a suit was instituted and tried, resulting in a judgment that the plaintiff had not a perfect title, and that immediately thereafter Roberts demanded that the plaintiff should proceed to perfect his title and convey the same to Roberts; that Roberts has at all times been ready and willing to perform his part of said contract of purchase, and that this action is the first step the plaintiff has taken to perfect his title. The answer

tenders into court the full purchase amount, and demands full performance on the part of plaintiff.

Certain other persons, as ordained ministers of the Methodist Episcopal Church of the United States of America, were made defendants, at their own request, by way of intervention. They in effect alleged that the property was, in the year 1880, conveyed by the then owners to certain persons as trustees for the benefit of the ministry and membership of said church in the United States; that said trustees have never been divested of the title so conveyed, and that the interveners are beneficiaries under the trust so continuing. They ask the dismissal of the plaintiff's complaint, and an adjudication that the trust still continues. After a trial the court entered judgment to the effect that the plaintiff is the owner of the property, and that the defendants and also the interveners have no interest therein. The defendants Roberts and the interveners have appealed.

All the appellants have joined in the appeal notice, appeal bond, and brief. We are unable, however, to see how their interests can be identical on the appeal, for the reason that the intervener appellants seek to establish that the original deed of trust for the benefit of the church did not vest in the trustees or their successors any power of alienation whatever, while the appellants Roberts seek to establish that such power was conferred but that it has never been properly exercised. The theory of the intervener appellants' answer would make it impossible for the other appellants ever to receive title to the property, since they claim that the property is for the perpetual use of the church only. To get such title is, however, the very thing the appellants Roberts seek to accomplish. We think further reference to the appeal of the intervener appellants will be unnecessary, for the reason that their affirmative answer in intervention was wholly denied and they introduced no evidence in support of it.

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respondent had introduced evidence for the purpose of establishing his title, he rested, and thereupon the appellants declined to introduce any evidence, and submitted to the court that the evidence was insufficient to establish a judgment for the respondent. The court then orally announced that it would find in favor of the appellants, and at the same time stated that it had grave doubts whether the property can ever be sold to be used for anything other than church purposes. This occurred on the 5th day of September, 1906, and on the 7th day of the same month the respondent served and filed a motion to reopen the case for the purpose of introducing further testimony. On the 15th day of the same month, over the protest of appellants, an order was made granting the motion. On the 5th day of November following, the court heard further testimony.

Appellants vigorously urge that the court erred in reopening the case. Their argument is based upon the theory that the oral announcement of the court was a judgment in the case. To this point they cite *Barthrop v. Tucker*, 29 Wash. 666, 70 Pac. 120. What was really decided there was that where a judgment was actually announced but was not entered, the court could, nearly two years afterwards, make a *nunc pro tunc* entry as of the former date conformably to the announcement then made. The announcement which had been made was the result of the concluded deliberations of the court. We regard the question there determined as very different from the one now before us. Here the court had heard certain testimony, and upon that as a basis orally announced certain things. The announcement of the court indicated that it was in grave doubt about some questions raised by the evidence submitted. Two days later one of the parties, after due notice to the other, made application for leave to submit further testimony. Under such circumstances we think it will not do to say that the court had no discretion in the matter. In *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20, the situation was very similar, and it was held

that it was a matter within the discretion of the court to reopen the cause for the hearing of further testimony. It is true, the opinion in that case does not state that any announcement had been made indicating the decision of the court; but the trial had closed and the cause had at least been argued and submitted. The difference in real essence between that case and the one at bar we think is insufficient to deprive the court of all discretion in the premises. We shall therefore not review the discretion of the court as exercised.

After the cause was reopened further testimony was submitted. This showed the contents of the written contract between respondent and the appellant John W. Roberts for the sale of the property. That contract provided that, if the title of the respondent should prove to be defective, then the $500 paid was to be returned to John W. Roberts. The answer of appellants avers a subsequent agreement that, if the title should prove to be defective, respondent should proceed to perfect it and then convey to appellants. This is the averment of a new agreement orally made, which materially changed the terms of the written contract.

The testimony further showed that, agreeably to the terms of the written agreement, appellants brought suit against respondent for the recovery of the $500, on the ground that the title was not good. Judgment was obtained in appellants' favor for the amount. The judgment was paid by respondent, and appellants took the money from the clerk's office. Appellants say that the suit was a friendly one, brought in pursuance of the aforesaid verbal agreement that respondent should perfect the title. The verbal agreement was, however, without force to change so materially the terms of the written agreement. In any event, whatever force might be attached to the verbal agreement, appellants by the action they brought elected to recover the money for want of good title. The recovery of the money was entirely inconsistent with the theory that appellants were still seeking the conveyance, and that respondent was to proceed to perfect his title and subsequently

convey it to the appellants. Appellants are now estopped to assert such an agreement. When appellants recovered the money, they rescinded their contract, and they have now no rights whatever in the property. Having no rights in the property, they have no interest in the review of the judgment merely because it declares the title to be in the respondent. Complaint is made that when the case was reopened, the court heard testimony from respondent only. Appellants introduced no evidence at any stage of the case. They do not appear to have asked permission at any time to introduce evidence. They were at all times during the trial present or represented by counsel and, in the absence of a request that they might submit testimony, it should not now be held that their rights were prejudiced in that regard.

The judgment is affirmed.

CROW, MOUNT, DUNBAR, and ROOT, JJ., concur.

FULLERTON and RUDKIN, JJ., took no part.

[No. 6851. Decided November 26, 1907.]

M. O'DAY *et al.*, *Appellants*, v. JACOB AMBAUM *et al.*, *Respondents*.[1]

PLEADING—COMPLAINT—DEMURRER—WAIVER. An order overruling a demurrer to a complaint for want of sufficient facts, followed by an answer, does not preclude the court from sustaining defendant's objection to any evidence at the trial on the ground that the complaint does not state sufficient facts, and that the evidence offered was insufficient to warrant a decree, where, under the most liberal rules of construction, the defect in the complaint and cause of action was one of substance which could not be cured by amendment.

FRAUDULENT CONVEYANCES — RIGHTS OF CREDITORS — PRIOR JUDGMENT OR LIEN—PRINCIPAL AND SURETY. An action to attack or sustain a fraudulent transfer of a debtor's property cannot be main-

[1]Reported in 92 Pac. 421.

tained by a simple contract creditor prior to obtaining judgment or a specific lien upon the property; and a surety upon a contractor's bond is such a simple contract creditor.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 25, 1907, upon sustaining defendants' objection to the introduction of evidence, dismissing an action to enjoin the conveyance of real estate. Affirmed.

Vince H. Faben, for appellants.

Aust & Terhune, for respondents.

Crow, J.—This action was commenced by M. O'Day and the Title Guaranty & Surety Company, a corporation, against Jacob Ambaum, Frank Conrad, Harry Wakes, Charlotte Wakes, his wife, and Charlotte La Croix, to enjoin the conveyance of certain real estate. The plaintiffs allege that on April 1, 1906, the defendant Jacob Ambaum entered into a contract with King county to construct a certain wagon road; that he as principal and the plaintiffs as sureties executed and delivered to King county a bond for the faithful performance of his contract; that about May 1, 1906, defendant Ambaum formed a partnership with the defendants Frank Conrad and Harry Wakes, for the purpose of performing the contract and constructing the road; that the partnership proceeded with the work; that shortly thereafter dissensions arose, and that an action is now pending in the superior court of King county wherein Harry Wakes as plaintiff seeks to dissolve the partnership. The complaint further alleges:

"(6) That the said defendants have mismanaged the said work in lax manner and have mismanaged the finances of said partnership and that said partnership is now insolvent and the said road cannot now be constructed for the price agreed upon between the partners nor for at least two thousand dollars additional and that there is outstanding about a thousand dollars in unpaid bills of the said partnership for material used upon said road and that the said defendants have already lost to these plaintiffs more than two thousand dollars over

and above the contract price by his mismanagement and misfeasance in the construction of said road and that the defendants are insolvent and have no property except such as is exempt from execution by law, except the defendants Harry Wakes and Charlotte Wakes, his wife, who are the owners of block 22 of Jordan's Acre Garden Tracts in King county, Washington, and that said property is the community property of the said Harry Wakes and wife.

"(7) That the said defendants Harry Wakes and wife have disposed of their property to deft. Le Croix, the daughter of deft. Wakes, without consideration for the purpose of avoiding their liability to the plaintiffs and to the said partnership in the construction of said county road and for the purpose of defeating any claims the plaintiffs might have against said defendants by reason of their defalcation in the performance of their contract aforesaid and that these plaintiffs are without remedy at law to protect their interests as aforesaid. That said property is described as block 22 of Jordan's Acre Gardens in King Co. Wash.

"(8) That it will take about forty days from the date of this complaint within which to complete and perform the said contract for the construction of said county road and to determine the amount of liability of the said defendants to these plaintiffs by reason of their said defalcation."

The plaintiffs demanded judgment restraining and enjoining the defendants from disposing of their nonexempt property until plaintiffs' liability as sureties on the bond could be determined. A general demurrer to the complaint was overruled. Thereupon the defendants Harry Wakes, Charlotte Wakes, his wife, and Charlotte La Croix, answered, and the plaintiffs replied. When the case was called for trial, the answering defendants objected to the introduction of evidence, on the ground that the complaint did not state a cause of action, and that the evidence offered was insufficient to sustain a decree. The objection being sustained, a final order was entered, dismissing the action, and the plaintiffs have appealed.

The appellants contend that the order overruling the respondents' demurrer adjudicated the sufficiency of their com-

plaint, became the law of the case, and thereafter bound the trial court. Bal. Code, § 4911 (P. C. § 378), provides that the objection that the complaint does not state facts sufficient to constitute a cause of action can be made at any stage of the proceedings. This court, however, has held that a defendant's failure to interpose a demurrer to a complaint, followed by an objection to its sufficiency made for the first time at the trial, will cause the court, in passing upon such objection, to bring to the support of the complaint every reasonable intendment and legitimate inference that may be drawn from its allegations, and also from the evidence adduced to sustain the plaintiffs' cause. If, on an application of this test, it appears that the defect in the plaintiff's complaint and cause of action is one of substance which cannot be cured by amendment or evidence, then it is the duty of a trial court to sustain the objection and dismiss the action. By the demurrer, which was not withdrawn or waived, the appellants were advised of the respondents' contention that their complaint was insufficient, and they might have anticipated the objection afterwards made. Nevertheless, if we apply to the allegations of the complaint and the evidence offered the most liberal rules of construction, we are compelled to hold that the trial court committed no error in sustaining the respondents' objection and dismissing the action.

The only additional fact suggested by the evidence offered and not covered by the allegations of the complaint, was that the appellants, as sureties on the bond of the defendant Ambaum, had undertaken the completion of the contract to protect themselves from further loss. It was not alleged, nor was it contended, that they had obtained any judgment against the respondents, or lien against their property, that they had commenced any action to recover damages, or that their damages had been liquidated. A simple contract creditor cannot, prior to obtaining a judgment or lien, attack as fraudulent his debtor's transfer of nonexempt property which might be applicable to the payment of his claim, nor can he

sustain an action to enjoin a threatened fraudulent transfer of his debtor's property until he has obtained a specific lien upon such property. 20 Cyc. 683; *Thompson v. Caton*, 3 Wash. Ter. 31, 13 Pac. 185; *Rothchild Bros. v. Trewella*, 36 Wash. 679, 79 Pac. 480, 104 Am. St. 973; *Alder v. Fenton*, 24 How. 407, 16 L. Ed. 696; *Uhl v. Dillon*, 10 Md. 500, 69 Am. Dec. 172; *Massey v. Gorton*, 12 Minn. 145, 90 Am. Dec. 287; *Wiggins v. Armstrong*, 2 Johns. Ch. 144.

Mr. Bump, in his work on Fraudulent Conveyances (4th ed.), at § 526, says:

"It is only by the acquisition of a lien that a creditor has any vested or specified right in the property of his debtor. Before such lien is acquired the debtor has full dominion over his property. He may convert one species of property into another, and he may alienate to a purchaser. The rights of the debtor and those of the creditors are thus defined by positive rules, and the point at which the power of the debtor ceases and the rights of the creditors commence is clearly established. A creditor without such lien cannot obtain an injunction to prevent the debtor from disposing of his property, although he has reason to apprehend that such disposition may be fraudulent."

Some of the reasons for the rule above mentioned are well stated by the supreme court of Illinois in *Shufeldt v. Boehm*, 96 Ill. 560, 564, in the following language:

"If the property of an honest, struggling debtor could be tied up by injunctions upon mere unadjusted legal demands, he would be constantly exposed to the greatest hardships and grossest frauds, for which the law would afford no adequate remedy. By taking his property out of his hands before the claim is due, or before its justice has been established by a judgment, in many cases would be to deprive him of the means of payment, and even of the means of defending himself against a vexatious and oppressive suit. In other cases, to prevent ruin to his business pending such litigation, he would be forced into unconscionable compromises involving losses he would be unable to bear. Moreover, such a rule as that contended for would be a constant temptation to selfish and avaricious creditors to endeavor, by the institution of such

suits, to obtain an unjust advantage over other creditors, and, by reason thereof, litigation would be greatly increased, to the detriment of business generally, and to the ruin of many honest, struggling debtors. Every consideration, therefore, of public policy demands a strict adherence to the rule which forbids the institution of such suits."

The appellants further claim that, being sureties, they occupy a trust relation with respondents; that they have superior equities by reason of their suretyship which entitle them to the injunctive relief sought. That appellants, although sureties, are simple contract creditors, as contended by the respondents, is shown by the following authorities: *Sanders & McLaughlin v. Watson*, 14 Ala. 198; *Washington v. Norwood*, 128 Ala. 383, 30 South. 405; *Mugge v. Ewing*, 54 Ill. 236.

No direct contract relation between appellants and the respondents who have appeared in this action has been alleged or shown. Appellants were sureties upon a bond in which Jacob Ambaum was the sole principal. But if it be conceded that a contract relation does exist between them and any of the respondents which will entitle them to recover a judgment against such respondents for damages sustained by appellants as sureties upon the bond, still they are not now entitled to the equitable relief sought in this action, for they have not yet reduced their claims to judgment, nor have they obtained any specific lien upon the property here involved.

The judgment is affirmed.

Hadley, C. J., Mount, Dunbar, Root, Rudkin, and Fullerton, JJ., concur.

[No. 6984. Decided December 3, 1907.]

MARY S. BULLOCK, *Appellant*, v. EDWIN B. WALLACE *et al.*, *Respondents.*[1]

VENDOR AND PURCHASER—BONA FIDE PURCHASE—NOTICE—RECORD—DEFECTIVE TAX TITLE. A recorded quitclaim deed to the owner from a tax title grantee, although the wife did not join therein, is sufficient to put upon inquiry grantees claiming to be *bona fide* purchasers through mesne conveyances from the tax title grantee, who inadvertently made the second deed, where inquiry would have disclosed that the quitclaim was made to rectify a mistake which rendered the tax title void.

TAXATION—TAX TITLE—VALIDITY—PAYMENT OF TAX—JUDGMENT—COLLATERAL ATTACK. Where taxes have in fact been paid by a nonresident owner, but a foreclosure for taxes resulted through the mistake of the county treasurer's office, a tax title secured by publication against a nonresident owner is void; and the same may be collaterally attacked under Laws 1897, p. 190, § 114, making the tax judgment conclusive in collateral proceedings "except where the tax or assessments have been paid."

SAME—RECOVERY OF LAND SOLD FOR TAXES—EJECTMENT—PLEADING. Bal. Code, § 5679, requiring the complaint in an action to recover lands sold for taxes to allege that the tax had been paid or tendered does not apply to an ordinary action of ejectment, where the plaintiff was ousted by one claiming under a void tax title which, under the law of 1897, was subject to collateral attack from the fact that the tax had already been paid.

EJECTMENT—JUDGMENT—IMPROVEMENTS. In ejectment the judgment as to improvements made and taxes paid by the defendant must conform to Laws 1903, p. 262.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 11, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action of ejectment. Reversed.

Kerr & McCord, for appellant.

Charles P. Harris, for respondents.

[1]Reported in 92 Pac. 675.

HADLEY, C. J.—This is an action in ejectment, the complaint containing the usual allegations in such cases. The defendants answered, alleging that they are the owners and entitled to the possession by virtue of being grantees, through mesne conveyances, of a tax title. At the trial evidence concerning the tax proceedings and sale was introduced by the defendants, and the plaintiff introduced evidence concerning her effort to pay the taxes, she claiming that the taxes were fully paid. The court found for the defendants, and entered judgment of dismissal, from which the plaintiff has appealed.

The material facts disclosed at the trial we find to be substantially as follows: The appellant was the owner of the land in the year 1891 and subsequent years up to and including the time of the tax foreclosure proceedings. For the years 1891 to 1897 inclusive, she paid the taxes upon the property continuously. She was the owner of lots 11 and 12, block 5, of Wasson's addition to Ravenna Park, Seattle. Through the mistake of her agent, she paid the taxes for the years 1898 and 1899 upon lots 10 and 11 instead of 11 and 12. She was not the owner of lot 10, and by the said mistake the taxes upon lot 12 were unpaid. She at all times resided in Lexington, Kentucky, and in May, 1901, she wrote to the treasurer of King county and asked for a full statement of the amount of her taxes. On the 28th day of May the treasurer replied to her letter and advised her that the total amount of taxes due, current and delinquent, including interest to July 1, 1901, was $3.85. She remitted that sum and the same was received in the office of the treasurer on the 8th day of July, 1901. Meantime, after the treasurer had forwarded the said tax statement to appellant, and on the 15th day of June, 1901, one Benton, through whom the respondents claim to have acquired title, commenced an action to foreclose a tax delinquency certificate upon said lot, issued by said treasurer on May 9, 1901. Service in the foreclosure proceedings was by publication, and appellant had no actual notice thereof.

A decree of foreclosure was entered on the 20th of August, 1901, and thereafter a tax deed was issued to said Benton.

At all times subsequent to the 8th day of July, the appellant had on hand with the county treasurer the sum of $3.85, paid to him for the purpose of liquidating the taxes, interest, and costs upon such lot. The treasurer failed to notify her of the pendency of the foreclosure proceedings, and failed to inform her that any additional sum of money was required to pay the taxes upon the property, including the costs and expenses of such foreclosure proceedings. No notice of any kind concerning such foreclosure proceedings was given to her until the month of December, 1901, at which time the treasurer wrote to her and stated that it was necessary for her to pay an additional sum of $7.05 for the accumulated interest and costs of the foreclosure proceeding, which sum she forwarded to the treasurer.

In the following month, January, 1902, after the sale of the property and the delivery of a tax deed therefor to Benton, the treasurer took the money, deposited with him by appellant in payment of taxes, interest, and costs, and delivered it to Benton and received from the latter a quitclaim deed for the property running to appellant. The treasurer took such course for the purpose of rectifying his own mistake. Benton was, at the time of making such deed, a married man, but his wife did not join in the execution thereof. The deed bore date December 23, 1901, and was regularly filed for record the next day. Thereafter, on the 8th day of October, 1902, Benton and wife executed a deed for the same property to Ida M. Sizer, and the latter and her husband, on March 15, 1904, made a deed therefor to the respondents in this action, who thereupon took possession of the lot and were in such possession when this action was commenced. Benton and wife executed the deed to Ida M. Sizer through an oversight.

Under the above facts the appellant claims that she paid her taxes, and that the tax sale conveyed no title. Upon the other hand, respondents claim that the proceedings were regu-

lar; that the tax title conveyed to Benton was a community one; that his quitclaim deed to appellant conveyed nothing because his wife failed to join, and that the subsequent deed of Benton and wife to respondents' grantors conveyed full title. Respondents claim that they were innocent purchasers having no actual knowledge of the facts about the attempted payment of taxes, and relying entirely upon the tax foreclosure proceedings. Benton's deed to appellant was, however, upon record when they received their deed. They were required to take notice of the existence of that deed for what it was worth. Upon its face it must have appeared to convey title, and it was certainly sufficient to put them upon inquiry as to its purpose. Such inquiry would doubtless have disclosed to them the above facts. Benton testified at the trial that the deed to respondents' grantors was inadvertently made, and an inquiry by respondents would no doubt have led them to that discovery, and they would thus have learned the facts about appellant's efforts to pay the taxes. However regular the tax proceedings may have been upon their face, we could not regard respondents in the light of entire innocence, even were they entitled to interpose such defense here. The existence upon record of the deed from the tax title grantee was in the nature of a danger signal warning respondents to look out for obstructions in the stream of title. They ignored the signal and steered ahead without regard to it. We do not mean to say that the deed from Benton to appellant conveyed actual title; but knowledge of its existence placed respondents in a position differing with regard to good faith from that of the ordinary purchaser in a tax proceeding record which is fair upon its face.

But however fair the tax record may have been, if the taxes were in fact paid, the foreclosure proceedings and the deed thereunder were void. The mere statement of facts, as hereinbefore set forth, we think is sufficient to show that appellant used every reasonable effort to pay her taxes, and that but for the mistake of the county treasurer's office the foreclosure pro-

ceedings would have been avoided. This fact was conceded by the treasurer and he endeavored to cure his mistake, believing that the short way to do it was for the tax foreclosure grantee to deed to the owner. Even then the appellant paid, and the tax purchaser received, the costs of a foreclosure that should not have been instituted.

"If the owner of land, or a party having an interest therein, in good faith applies to the proper officer for the purpose of paying the tax thereon, and payment is prevented by the mistake or fault of such officer, . . . the attempt to pay is considered, in most jurisdictions, as the legal equivalent of payment in so far as to discharge the lien and bar a sale for nonpayment." 27 Am. & Eng. Ency. Law (2d ed.), p. 755. See cases there cited from different jurisdictions.

In *Breisch v. Coxe,* 81 Pa. St. 336, 346, the court was dealing with an attempt to pay taxes, and observed as follows:

"It is an almost universal rule, which substitutes a tender for performance, when the tender is frustrated by the act of the party entitled to performance."

The facts, we think, require the holding that the foreclosure was unauthorized in law, that the sale and deed thereunder were void, and that appellant was not divested of her title thereby.

Respondents, however, contend that appellant's attack here upon the tax judgment and deed is collateral, and cannot for that reason be maintained. This court, in *Smith v. Jansen,* 43 Wash. 6, 85 Pac. 672, held that the owner who has paid his taxes may defeat a tax judgment in a collateral proceeding where the tax judgment was taken by default on constructive service. The decision was based upon the terms of § 114, Laws of 1897, page 190, which makes tax judgments conclusive evidence of their regularity in all collateral proceedings, "except in cases where the tax or assessments have been paid . . ." The judgment against appellant was taken by default and upon constructive service, which brings this case directly within the terms of the case cited.

It is also urged that the action is one to recover property sold for taxes, and that Bal. Code, § 5679 (P. C. § 8734), requires that the complaint in such actions must set forth that the tax has been paid or tendered, which this complaint does not do. Whatever may be said under the statute of the necessary contents of a complaint purporting to be an action to recover property sold for taxes, it does not apply here. The action is one of ordinary ejectment which appellant has the right to maintain, for the reason that she has at all times been the owner and entitled to the possession, and has been unlawfully ousted by respondents. Moreover the statute cited was passed in 1888, and if it can be said that it was intended to authorize attacks upon tax proceedings by direct attacks only, its effect has been nullified in that regard by the later statute of 1897, cited above, which expressly permits collateral attacks when the taxes have been paid.

Appellant alleged damages by way of rental value and also general damages, but she introduced no evidence upon the subject. Respondents also set up a claim under the statute, Laws of 1903, page 262, for the value of the improvements placed upon the property, and introduced some evidence concerning the same. The evidence showed certain improvements in the way of clearing, fencing, the digging of a well, and the construction of a windmill, tower and pump. A small amount of taxes was also shown to have been paid by respondents. The court made no findings as to the value of the improvements, and the evidence is such that we are unwilling to make findings upon that subject. The largest item of value of the improvements is the well, together with the windmill and tower, and it was testified that the center of the windmill, the plunger, is exactly on the line between the lot in question and the adjoining lot 13, the latter not owned by the appellant. Respondents dispute this, and claim that the improvement is wholly upon lot 12. But the conflict in the testimony is such that we think a finding upon the subject can only be properly made under the evidence of surveyors who have made accurate

test measurements. The location of the well with its tower and windmill is a material element in determining the value, if any, which it may be to appellant's lot. As the judgment must be reversed for reasons heretofore stated, we think the cause should be remanded for the taking of testimony upon the subject of the improvements; and after ascertaining their value, the court should enter its judgment for appellant for the recovery of the land, and make its judgment with reference to the improvements and taxes paid conform to the statute of 1903 aforesaid.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

RUDKIN, FULLERTON, MOUNT, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 6586. Decided September 5, 1907.]

ILLINOIS REFRIGERATOR COMPANY, *Respondent*, v. E. L. RICE, *Appellant*.[1]

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 11, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury. Affirmed.

A. E. Barnes, *H. M. Brooks*, and *E. L. Rice*, for appellant.
Belden & Losey, for respondent.

PER CURIAM.—This action was brought by the respondent to recover from appellant the value of certain goods alleged to have been wrongfully appropriated by the appellant, who was acting as agent for respondent in the sale of goods. Upon issues joined, the cause was tried to the court without a jury. Findings and a judgment were entered in favor of the respondent.

The questions presented on this appeal are wholly questions of fact. We have carefully examined the evidence and are satisfied that the trial court arrived at a correct judgment in the case. It is needless to discuss the evidence. The judgment is affirmed.

[No. 6725. Decided September 6, 1907.]

EDGAR AMES, *Appellant*, v. GEORGE KINNEAR *et al.*, *Respondents*.[1]

Appeal from a judgment of the superior court for King county, Griffin, J., entered September 26, 1906, after a trial before the court without a jury, dismissing on the merits an action for the specific performance of a subscription contract. Affirmed.

Bausman & Kelleher and *Sachs & Hale*, for appellant.
Jas. M. Epler and *Chas. A. Kinnear*, for respondents.

PER CURIAM.—This is the second appeal in this case. For the former opinion see 42 Wash. 80, 84 Pac. 629. Reference is here made to that opinion for a full statement of the nature of the controversy. By that decision the trial court was directed to overrule the demurrer to the answer, and upon the return of the cause to that court, the demurrer was overruled, and the plaintiff replied to the

[1]Reported in 91 Pac. 1135.

answer. With the issues thus formed, the cause was tried before the court without a jury, and resulted in a judgment dismissing the cause, from which the plaintiff has appealed.

The findings of the court are substantially in accordance with the facts averred in the affirmative defense, the scope of which may be seen by reference to the former opinion. The only matter urged upon this appeal is the insufficiency of the evidence to sustain the findings. We have carefully read the testimony, and we find evidence fully supporting the court's findings. We are satisfied that, under the record, we would not be justified in disturbing the findings as made. It is true, there is conflict in the testimony upon some material points, but we shall not undertake to say from the record before us that the trial court erred in finding the greater weight of the evidence to be with the respondents. The findings do not necessarily reflect upon the integrity of any witness. Years had elapsed between the happening of the events and the time of the trial. Under such circumstances, it is a common experience with the best of men to remember particular facts somewhat imperfectly. The conflict in this case we believe is due to such fact, rather than to any intentional misstatement on the part of any of the witnesses. Upon the whole evidence, we are satisfied with the findings of the trial court. The conclusions of law follow therefrom, and the judgment is affirmed.

[No. 6760. Decided September 7, 1907.]

JOSEPH SMITH, *a Minor, by His Guardian Ad Litem Viola Smith, Respondent*, v. CAPITOL BOX COMPANY, *Appellant*.[1]

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 10, 1906, on the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for personal injuries sustained by an employee in operating a saw. Affirmed.

R. S. Eskridge (*Philip Tindall*, of counsel), for appellant.
Govnor Teats, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries. The facts are in essential particulars the same as those involved in *Cox v. Capitol Box Co.*, *ante* p. 148, 91 Pac. 555. The accident occurred in the same mill and the plaintiff here was engaged in doing the same kind of work as was the plaintiff in the case cited. For a description of the plaintiff's situation as an operator of the ripsaw cutting ventilating slits in the bundles of veneer

[1]Reported in 91 Pac. 557.

for use in grape boxes, we refer to the statement of the facts in the opinion in the cause mentioned. In the case at bar, the plaintiff, who was operating the ventilating saw, was at the time about sixteen years of age, and his offbearer, a boy of the name of Haviland, was somewhat older, but at the time of the accident he was not yet seventeen years of age. Haviland quickly jerked the bundle of veneer away just as it was about to clear the saw, and the plaintiff's hand dropped from the bundle against which it was pressing and fell upon the saw, whereby it was severely cut and injured. The plaintiff had, during his employment, been most of the time engaged in other work, and up to the time he was hurt he had operated the ventilating saw perhaps as much as one whole day. He and Haviland had been working together at the saw but a short time when the accident happened. There was evidence that Haviland was of a negligent nature; that he was indolent, and that he worked in a lubberly, careless way; that he was generally reputed among the employees of the mill as being incompetent and lazy, and as taking no interest in his work. He had worked in the mill about a month and the foreman daily passed and observed, or could have observed, his manner and method of working. The cause was submitted to a jury under issues and instructions similar to those in the case above cited, with the result that a verdict was returned for plaintiff in the sum of $1,000. Judgment having been entered for said sum, the plaintiff has appealed.

We see no reason for distinguishing this case from that of *Cox v. Capitol Box Co.*, *supra*, unless it be in the way of finding additional elements of negligence, which possibly make this a stronger case against appellant. There is no necessity for reviewing these in detail, further than as they are suggested above. The parallel facts of the two cases we think are sufficient of themselves to lead to the same result, and for the reasons stated in the other opinion the judgment in this case is affirmed.

CROW, MOUNT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

[No. 6664. Decided October 19, 1907.]

JOHN D. SMITH, *Respondent*, v. HECLA MINING COMPANY, *Appellant*.[1]

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered March 3, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

R. J. Danson, for appellant.

Robertson, Miller & Rosenhaupt and *John Marshall Bunn*, for respondent.

PER CURIAM.—This is an action for damages for personal injuries. The case was tried by this court on appeal, and it is reported in 38 Wash. 454, 80 Pac. 779, where a full statement of the facts can be found. The judgment in favor of the plaintiff was reversed by this court, and a new trial granted for errors committed in the admission of testimony and the giving of instructions. Upon a retrial, judgment was again obtained by the plaintiff, and the defendant again appeals to this court, asking for a reversal of the said judgment.

Without entering into an analysis of the testimony, which is exceedingly voluminous, an inspection of the record convinces us that the cause was tried within the rule announced by this court in its former opinion, and that no error was committed in the admission or rejection of testimony, or in the giving or refusing to give instructions. So that the jury were legally qualified to pass upon the questions of fact involved in the cause.

It is urged by the appellant that the judgment is excessive, the amount being $4,750. But from the uncontradicted testimony and the character of the injuries shown to have been sustained by the respondent, we do not feel justified in interfering with the discretion exercised by the jury in that regard.

The judgment is affirmed.

[1]Reported in 92 Pac. 1135.

[No. 6518. Decided November 15, 1907.]

THE STATE OF WASHINGTON, *on the Relation of E. O. Snodgrass, Appellant*, v. F. A. SAVAGE, *as Auditor of Stevens County, Respondent.*[1]

Appeal from a judgment of the superior court for Stevens county, Warren, J., entered July 20, 1906. Affirmed.

S. & J. W. Douglas, for appellant.
F. H. McDermot and *L. C. Jesseph*, for respondent.

PER CURIAM.—On or about the 7th day of March, 1906, the county commissioners of Stevens county, pursuant to an act of the legislature of March 9, 1905 (Laws 1905, page 349), appointed the relator as game warden in and for said county, to succeed one John D. Slocum. The salary fixed by the commissioners for that office while occupied by Slocum was $25 per month. After the relator entered upon the discharge of his duties, the commissioners increased, or attempted to increase, the salary to $100 per month. The respondent refusing to issue a warrant for said salary, the relator instituted this proceeding to compel him so to do. From a judgment of dismissal, this appeal is taken.

Among other defenses urged against relator's action, was the unconstitutionality of the statute under which relator was appointed. Respondent contends that this statute is unconstitutional for several reasons, one of which is that it does not provide for the election of the county game warden. We think the case falls squarely within the decision of this court, rendered on April 15, 1907, in *State ex rel. Egbert v. Blumberg*, 46 Wash. 270, 89 Pac. 708, wherein it was held that the statute providing for the appointment of county fruit inspectors was in conflict with § 5, art. 11, of the state constitution, in that it did not provide for an election of such officers. Upon the authority of that case the judgment of the trial court herein is affirmed.

On account of discourteous and offensive language appearing, uncalled for, in respondent's brief (page 22), costs for the printing of said brief will not be allowed as against appellant.

[1]Reported in 92 Pac. 409.

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51. APPEAL—DECISION—EFFECT OF REVERSAL—PAYMENT PENDING APPEAL—RECEIVERS. Money paid out by a receiver under order of court, after notice of appeal from the order, but before the appeal was perfected, is paid out at the peril of the receiver, who, upon reversal of the order, must look to the parties to whom it was paid. *Johnson v. Joslyn*..... 531

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As waiver of objection to jurisdiction, see APPEAL AND ERROR, 15.

1. APPEARANCE—PROCESS—WAIVER. A voluntary answer constitutes a general appearance and waives service of process. *Calhoun v. Nelson* 617

APPLIANCES:

Liability of employer for defects, see MASTER AND SERVANT, 5, 8, 16, 20.

APPLICATION:

For sale of tide lands, see PUBLIC LANDS, 1.

APPORTIONMENT:

Of expenses or benefits of public improvements, see MUNICIPAL CORPORATIONS, 2.

ASSAULT:

On passenger by employee of carrier, see CARRIERS, 13, 14.

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For public improvements, see MUNICIPAL CORPORATIONS, 2-4.

ASSIGNMENT:

Of bill of exchange, see BILLS AND NOTES, 1.

Reliance of purchaser on satisfaction of mortgage by assignee, see MORTGAGES, 2.

ASSIGNMENT OF ERRORS:

On admission of evidence, see APPEAL AND ERROR, 21.

ASSOCIATIONS:

See BUILDING AND LOAN ASSOCIATIONS.

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 9, 10, 19-21.

ATTACHMENT:

1. ATTACHMENT—WHEN ISSUES—WHILE PROSECUTING FORECLOSURE—CHATTEL MORTGAGES. In an action brought to foreclose a chattel mortgage, an attachment cannot be issued and levied upon other property, in anticipation of an unknown deficiency, in view of Bal. Code, § 5893, providing that the plaintiff shall not prosecute any other action for the same matter while he is foreclosing his mortgage. *Advance Thresher Co. v. Schimke*..... 162

ATTORNEY AND CLIENT:

Misconduct of counsel as harmless error, see APPEAL AND ERROR, 42, 44.

Attorneys' fees as costs, see COSTS, 1.

Authority of county board to employ, see COUNTIES, 3.

Letters as evidence of services performed, see EVIDENCE, 1.

Husband's liability on wife's contract for fees in action for divorce, see HUSBAND AND WIFE, 1, 2.

Recovery of attorney's fees, see USURY, 3.

Privileged communications, see WITNESSES, 4.

1. ATTORNEY AND CLIENT — DISBARMENT — JURISDICTION — GROUNDS. The state courts have jurisdiction to disbar an attorney for the solicitation of money for the purpose of bribing a referee in bankruptcy, appointed by the United States court, as it directly involves the attorney's integrity and professional conduct, and it is immaterial in what court the act was committed. *State ex rel. Hardin v. Grover* 39

2. SAME—TRIAL—FINDINGS—SEPARATION. In proceedings in disbarment of an attorney founded on two distinct charges, findings stated as if the charge contained but one specification are sufficient, as the law does not require findings to be separated as to distinct causes of action. *State ex rel. Hardin v. Grover*..... 39

AUTHORITY:

Of broker, see BROKERS, 2.
Of corporation, conditions precedent, see BUILDING AND LOAN ASSOCIATIONS.
Of county board to employ counsel, see COUNTIES, 3.
Of governor to revoke pardon, see PARDON, 1.
Of agent, see PRINCIPAL AND AGENT.

AUTOMOBILES:

Injury to traveler on highway, see HIGHWAYS, 6.

BAILMENT:

Carriage of goods, see CARRIERS, 2, 3.

BAR:

Of action by former adjudication, see JUDGMENT, 3-7.
Of action by limitation, see LIMITATION OF ACTIONS.

BENEFICIAL ASSOCIATIONS:

Mutual benefit insurance association, see INSURANCE, 2.

BENEFITS:

Acceptance of as ground of estoppel, see ESTOPPEL, 2.
Assessment of benefits caused by construction of public improvements, see MUNICIPAL CORPORATIONS, 2-4.

BETTERMENTS:

Recovery in ejectment, see EJECTMENT.

BILL OF EXCHANGE:

See BILLS AND NOTES.

BILLS AND NOTES:

As usurious exaction for loan, see USURY, 1, 2.

1. BILLS AND NOTES—ACCEPTANCE—WRITING — ASSIGNMENTS — STATUTES—CONSTRUCTION. Under Laws 1899, p. 362, § § 126, 127, defining a bill of exchange to be a signed order requesting another to pay a sum to a third person, and providing that it does not operate as an assignment or create any liability until accepted in writing, an order requesting that sums due or to become due to the drawer from the drawee, be paid to a third person, does not amount to an equitable assignment of the funds or render the drawees liable thereon until the order is accepted by them in writing. *Frederick & Nelson v. Spokane Grain Co*..... 85

2. BILLS AND NOTES — LIABILITY ON INDORSEMENT — PRINCIPAL AND AGENTS—BROKERS—FOR WHOM ACTING. Where the owner of lands agreed with C. with respect to a net price at which C. might sell the property, brokers employed by C. to effect a sale are not agents of the

BILLS AND NOTES—CONTINUED.

owner, where it appears that they found a prospective purchaser and took from him a draft and indorsed the same over to the owner, without limitation, as a first payment demanded by the owner, which was to be forfeited in case the other payments were not made; hence the brokers are liable to the owner on their indorsement upon dishonor of the purchaser's draft. *O'Connell v. Marvin*..... 8

3. BILLS AND NOTES—TRANSFERS—BONA FIDE PURCHASER—EVIDENCE—SUFFICIENCY. In an action to recover on drafts, plaintiff claiming to be a purchaser without notice of failure of consideration by reason of fraud in the sale of jewelry for which the drafts were payment, there is sufficient evidence to sustain a verdict for defendants, where it appears that the goods were worthless, the sale fraudulent, and little better than obtaining money under false pretenses; that the president of the plaintiff, a bank at the home of the vendor, knew of the nature of the business, had purchased many similar drafts and had much litigation over the same by reason of failure of consideration, and his testimony leaves doubt as to whether there was any actual purchase of the drafts by the bank. *Johnson County Savings Bank v. Rapp*..... 30

4. BILLS AND NOTES — BONA FIDE PURCHASER — EVIDENCE — SIMILAR TRANSACTIONS. Upon an issue as to whether a bank was a *bona fide* purchaser of a draft taken from one of its customers on a fraudulent sale of goods, evidence as to similar transactions with the bank, resulting in like litigation, is admissible to show the knowledge of the bank as to the character of the paper. *Johnson County Savings Bank v. Rapp*..... 30

5. BILLS AND NOTES—MORTGAGES—ACTIONS—CONDITIONS PRECEDENT—CONFLICT OF LAWS. Foreclosure of security is not a prerequisite to an action in this state upon a note made in Montana, secured on property in California, under the statutes of Montana requiring foreclosure of a mortgage before any resort to the note secured thereby. *Mantle v. Dabney*..... 394

BONA FIDE PURCHASER:

Of draft, see BILLS AND NOTES, 3, 4.
Of property sold under execution, see EXECUTION.
Of property sold under conditional sale, see SALES, 4.
Of lands, see VENDOR AND PURCHASER, 4-6.

BONDS:

As waiver of objection to jurisdiction in action on maritime tort, see COURTS, 3.
Sureties on bonds, see PRINCIPAL AND SURETY.

BONUS:

Exaction of for loan, see USURY, 1, 2.

BOUNDARIES:

1. BOUNDARIES—LOCATION OF CORNERS. The law establishes an obliterated corner where the surveyor actually located it, and not where it ought to be located by a correct survey. *Inmon v. Pearson* 402

2. SAME—AGREEMENT AS TO LOCATION—ESTOPPEL. An agreement for the reestablishment of a lost corner does not estop the party from objections to its location pursuant to the agreement when all the conditions of the agreement had not been carried out. *Inmon v. Pearson* 402

3. SAME — BOUNDARIES — EVIDENCE—HEARSAY. Hearsay or general reputation is admissible to establish the location of a lost or obliterated boundary line or corner. *Inmon v. Pearson*..... 402

BREACH:

Of conditional pardon, see PARDON, 3.
Of contract, see SALES, 1, 2.

BRIEFS:

Assignment of errors in, see APPEAL AND ERROR, 21.

BROKERS:

Liability on indorsement of draft, see BILLS AND NOTES, 2.

1. BROKERS—EMPLOYMENT—PRINCIPAL AND AGENT—RELATIONSHIP — EVIDENCE—SUFFICIENCY. Brokers are not shown to be the agents of the owners, although they accepted a commission, where it appears from the correspondence between them that the brokers, claiming to have a client desiring the property, first sought employment, and then an option, that the owners refused employment to them as agents on a commission basis, and refused them an option, but fixed their own price "net," and after much correspondence offers were made direct and accepted, which precluded any legal claim for a commission, although the owners did pay a commission and may not have been informed that the brokers were interested in the purchase, the brokers not having demanded the commission, and the parties having dealt at arm's length. *Steele v. Lawyer*..... 266

2. BROKERS—AUTHORITY TO SELL — CONTRACTS — CONSTRUCTION—SPECIFIC PERFORMANCE. A written authority to a broker giving exclusive power to sell certain described property and agreeing to convey the same to any purchaser designated, upon compliance with the specified terms, authorizes the broker to make a binding contract of sale which may be specifically enforced, where the agent's contract is clear and specific in its terms. *Littlefield v. Dawson*..... 644

BUILDING AND LOAN ASSOCIATIONS:

1. BUILDING AND LOAN ASSOCIATIONS — WHAT CONSTITUTES — AUTHORITY TO DO BUSINESS. A foreign corporation is not authorized to transact business in this state, without compliance with the statutes relating to building and loan associations, where the general purpose of its business is the creation of a fund by small periodic payments from which loans may be made to those who are otherwise unable to obtain them through inability to give security, on any general plan similar to that of an ordinary building and loan association. *State ex rel. Atkinson v. Co-Operative Homebuilders* 235

2. SAME—LOAN TO NONMEMBERS—PENALTY. The fact that loans are to be made to nonmembers does not authorize such a corporation to do business in this state without compliance with the building and loan statute, since the statute authorizes loans to nonmembers and no penalty is prescribed for doing business in violation of the statute. *State ex rel. Atkinson v. Co-Operative Homebuilders*..... 235

3. SAME. The fact that such corporations are amenable to the usury laws does not affect their right to do business without compliance with the statute. *State ex rel. Atkinson v. Co-Operative Homebuilders* 235

BURDEN OF PROOF:

In action for personal injuries, see CARRIERS, 5, 9.

In proceeding to determine violation of conditional pardon, see PARDON, 2.

In action to recover property under terms of conditional sale, see SALES, 4.

CANCELLATION OF INSTRUMENTS:

Setting aside fraudulent conveyances, see FRAUDULENT CONVEYANCES.

Of deed to tide lands, see PUBLIC LANDS, 3-5.

Rescission of contract of sale of land, see VENDOR AND PURCHASER, 1, 3.

1. CANCELLATION OF INSTRUMENTS—FRAUD—EVIDENCE — SUFFICIENCY. A deed made by a mother to her son, who supported her, will not be set aside as procured by fraud and undue influence, at the suit of a daughter, where it appears that the mother and daughter were estranged, that the deed was made voluntarily seven years before the mother's death, while in complete possession of her faculties, and for the purpose of preventing the daughter from obtaining any share thereof. *McClellan v. O'Connor*..... 121

CARRIERS:

Excessive damages for personal injuries, see DAMAGES, 6, 8-12, 14, 15.

1. CARRIERS—REGULATION OF RATES—RAILROAD COMMISSION—PLEADING AND ISSUES. Under Laws 1905, p. 145, § 3, authorizing the rail-

CARRIERS—CONTINUED.

road commission to determine the reasonableness of rates, "Upon complaint made," and after a full hearing, the commission cannot, upon a complaint as to certain distance tariffs, make an order that certain other commodity rates shall not be increased, where the complaint alleged the latter to be fair and reasonable; since no issue was presented thereon and no order could be made relating thereto without notice and hearing; the remedy for an increase of such rates being by another complaint. *State ex rel. Great Northern R. Co. v. Railroad Commission*..... 627

2. CARRIERS—CARRIAGE OF GOODS—CONNECTING CARRIER — AGENCY — PLACE OF DELIVERY—LIEN FOR ADVANCES. Upon the consignment of goods to a common carrier to be carried over successive routes, the first and succeeding carriers become the agents of the owner to make delivery to the next carrier, and it is their duty to forward the goods to their destination by the usual or best route, in the absence of apparent limitation, regardless of undisclosed contracts of the consignee with respect to the shipment; and the last carrier has a lien for its charges and advances paid, regardless of the fact that by mistake or otherwise the goods were sent over the wrong route or that the consignee had a special contract with another carrier to whom they should have been delivered. *Andrus v. Columbia & Okanogan Steamboat Co*..... 333

3. SAME—DUTY TO FORWARD—EMERGENCY. Where a consignee of a shipment of powder had a special arrangement whereby a certain carrier was to transport its goods by boat from W. to R., and such carrier sold its only boat to the only other carrier between the points stated, an emergency arises requiring the forwarding of the powder regardless of the consignee's previous contract with the former carrier. *Andrus v. Columbia & Okanogan Steamboat Co*..... 333

4. CARRIERS — INJURY TO PASSENGER — PLEADING — INSTRUCTIONS. Where the complaint only alleges negligence of a carrier in causing a collision of two of its street cars in the most general terms, the defendant is not entitled to an instruction that the plaintiff's proof must be confined to the specific allegations of the complaint. *Russell v. Seattle, Renton & Southern R. Co*..... 500

5. SAME—PRESUMPTIONS—BURDEN OF PROOF. Where a carrier admits a collision of two of its street cars, negligence is presumed, and the burden of proof is upon the defendant to show some other cause. *Russell v. Seattle, Renton & Southern R. Co*..... 500

6. CARRIERS — INJURIES TO PASSENGERS — DEGREE OF CARE — INSTRUCTIONS. It is proper to instruct that a street railway company, operating by electricity in the carriage of passengers, must use "the highest degree of care, skill, and diligence practicable, consistent with the operation" and it is liable for "the slightest negligence in said operation," as the latter is but a corollary of the former. *Jordan v. Seattle, Renton & Southern R. Co*..... 503

CARRIERS—CONTINUED.

7. SAME—PLEADING—PRESUMPTIONS. Where a complaint alleges negligence in general terms in the operation of street cars, which collided, without specifying any particular act, the presumption of negligence arises from the fact of the collision, and is not waived by the general form of the allegation. *Jordan v. Seattle, Renton & Southern R. Co.* 503

8. CARRIERS—PASSENGERS—DEGREE OF CARE—INSTRUCTIONS. It is not error to instruct that the highest degree of care and skill owed by a street railway company to its passengers is that which would be exercised by "very" careful and experienced conductors and motormen generally. *Connell v. Seattle, Renton & Southern R. Co.*... 510

9. SAME — PLEADING — PRESUMPTIONS — INSTRUCTIONS — BURDEN OF PROOF. The fact that a complaint, in an action for injuries from a street car collision, is general in its terms, specifying no particular acts, does not preclude the presumption of negligence from the fact of the collision, and the jury is properly instructed that they may find for the plaintiff if the defendant's proof fails to overcome such presumption. *Connell v. Seattle, Renton & Southern R. Co.*..... 510

10. CARRIERS—OF PASSENGERS — NEGLIGENCE OF MOTORMAN — CONTROL OF STREET CAR ON STEEP GRADE. It is gross negligence for a motorman, on a street car heavily loaded with passengers, after turning off the power and setting the brakes at the top of an eleven per cent grade, to leave the controller surrounded by passengers, allowing the car to descend without any guiding hand, and go so far from his post of duty that, when a passenger turned on the power and released the brakes, he could not return until the car had sped a distance of four or five blocks, there being no controlling necessity for such action. *Mooney v. Seattle, Renton & Southern R. Co.*..... 540

11. CARRIERS — INJURIES — PASSENGERS ALIGHTING — ACCELERATION OF SPEED. A street railway company is liable for personal injuries sustained by a passenger, about to alight from a car, where it appears that she gave notice to stop at a certain street, that the conductor gave the motorman the signal to stop there, that as the car approached the street at a slow rate of speed she went to the back platform preparatory to alighting, and as the car reached the center of the street, its speed was suddenly accelerated, throwing the plaintiff into the street, it appearing that the sudden acceleration was not for the purpose of reaching the far crossing, as the car did not stop. *Ranous v. Seattle Electric Co.*..... 544

12. SAME—DANGERS IN ALIGHTING — KNOWLEDGE OF OPERATORS. The operators of a street car are bound to know that where a bell is sounded to stop at a certain street, passengers act thereon and may be in a place of danger preparatory to alighting. *Ranous v. Seattle Electric Co.* 544

CARRIERS—CONTINUED.

13. CARRIERS—PASSENGERS—TERMINATION OF RELATION—MASTER AND SERVANT—TORT OF SERVANT. A street railway company is liable for an assault committed by a conductor upon a passenger who, being entitled to a transfer, had stepped from the car to the street, as commanded to do by the conductor, and was requesting the conductor for the transfer at the time of the assault; as he had not been carried to his destination and the relation of carrier and passenger had not terminated. *Blomsness v. Puget Sound Electric Railway* 620

14. CARRIERS—WRONGFUL EJECTION — DAMAGES — WITNESSES — CROSS-EXAMINATION. In an action for severe personal injuries sustained in the ejection of a passenger, where plaintiff testified that on the same afternoon he took railroad trips to another town, before consulting a physician, cross-examination as to the purpose of his trips is proper, as it bears upon the severity of the injuries. *Schneider v. Great Northern R. Co.* 45

CERTIFICATE:

As *prima facie* evidence of compliance with factory act, see MASTER AND SERVANT, 2.

CERTIORARI:

Review of proceedings for establishment of highways, see HIGHWAYS, 1, 5.

1. CERTIORARI — SCOPE OF REMEDY — FINALITY OF ORDERS REVIEWED. Certiorari does not lie to review the denial of a motion to dismiss an action upon stipulation, under Bal. Code, § 5741, providing that the writ may issue to correct any erroneous or void proceeding when there is no appeal or any plain, speedy or adequate remedy at law. *State ex rel. Smith v. Superior Court* 508

2. CERTIORARI—CESSATION OF CONTROVERSY. Certiorari to review an order respecting a commission to take testimony in a pending cause will be dismissed, where, before the hearing in the supreme court, the action has been dismissed. *State ex rel. Clifford v. Superior Court* 35

CHALLENGE:

To evidence at trial, see TRIAL, 5-7.

CHANGE OF VENUE:

Of civil actions, see VENUE.

CHARGE:

To jury in civil actions, see TRIAL, 8-13.

CHATTEL MORTGAGES:

1. CHATTEL MORTGAGES—SHEEP—INCREASE. A chattel mortgage of "1,200 head of ewe sheep and their increase; 300 head of two-year-old wether sheep," does not include the clip of wool. *Libert v. Unfried* 186

2. CHATTEL MORTGAGES—RECEIVERS. Under Bal. Code, § 5455, any person appointed by the court to take charge of mortgaged chattels during the pendency of foreclosure proceedings is a receiver. *Libert v. Unfried* 182

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

See ALIENS.

Privileges and immunities, see CONSTITUTIONAL LAW.

CLAIM AND DELIVERY:

See REPLEVIN.

CLAIMS:

For personal injuries from defect in streets, see MUNICIPAL CORPORATIONS, 5.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW.

CLOUD ON TITLE:

See QUIETING TITLE.

COLLATERAL ATTACK:

Of proceedings to condemn land for county road, see HIGHWAYS, 2, 3.

Judgment in tax foreclosure proceedings, see TAXATION, 2.

COLLISION:

Between railroad trains, injuries to passengers, see CARRIERS, 4-9.

Between street cars, or with vehicles, see STREET RAILROADS.

COLLUSION:

At sale of state tide lands, see PUBLIC LANDS, 2.

COMMERCE:

Regulation of pilotage laws, see PILOTS.

COMMISSIONERS:

Conclusiveness of decision as to benefits from local improvements, see MUNICIPAL CORPORATIONS, 4.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY PROPERTY:

Disposition on divorce, see DIVORCE, 3.
In general, See HUSBAND AND WIFE, 4, 5.

COMPENSATION:

For property taken for public use, see EMINENT DOMAIN, 5-12, 15, 16, 21.
For services, see MASTER AND SERVANT, 3.
Of officers in general, see OFFICERS.
Inequality of services as ground for, see PARTNERSHIP, 2.
Increase of salary during term of office, see STATUTES, 3.

COMPETENCY:

Of witnesses in general, see WITNESSES.

CONDEMNATION:

Taking property for public use, see EMINENT DOMAIN.

CONDITIONAL SALES:

See SALES, 3, 4.
Forfeiture of by acquiescence, see VENDOR AND PURCHASER, 2.

CONDITIONS:

Precedent to action on note, see BILLS AND NOTES, 5.
Precedent by foreign corporation to transact business, see BUILDING AND LOAN ASSOCIATIONS.
Precedent to condemnation proceedings, see EMINENT DOMAIN, 8-10.
In deposit of deed in escrow, see ESCROWS, 1.
Precedent to setting aside fraudulent conveyance, see FRAUDULENT CONVEYANCES.
Precedent to action for specific performance, see SPECIFIC PERFORMANCE, 1.

CONFIDENTIAL RELATIONS:

Disclosure of communications, see WITNESSES, 4, 5.

CONFLICT OF LAWS:

As to action on note, see BILLS AND NOTES, 5.
As to marriage, see MARRIAGE.

CONNECTING CARRIERS:

See CARRIERS, 2, 3.

CONSIDERATION:

Of contract in general, see CONTRACTS, 2.
Admissibility of parol evidence to show failure of consideration, see EVIDENCE, 3.

CONSPIRACY:

Evidence of to defraud, see FRAUD.

CONSTITUTIONAL LAW:

Creation of new counties, see COUNTIES, 1, 2.
Increase in compensation of officers during term of office, see OFFICERS.
Subjects and titles of statutes, see STATUTES.
Equality and uniformity in taxation, see TAXATION, 1.

1. CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—SUNDAY CLOSING OF THEATERS. Bal. Code, § 7250, providing a fine for keeping "open any play house or theater" on Sunday was intended to prevent the opening thereof for the purpose of giving plays or performances, and not to opening for the purpose of religious or other quiet, legitimate, and orderly exercises; and hence is not unconstitutional as an abridgment of the rights of individuals. *State v. Herald*. 538
2. CONSTITUTIONAL LAW — CLASS LEGISLATION — PILOTS. An act requiring an applicant for a pilot's license to be a qualified voter does not unlawfully discriminate between citizens of the state. *State v. Ames* 328

CONSTRUCTION:

Of statutes, see STATUTES, 3.

CONTINUANCE:

1. CONTINUANCE—ABSENCE OF PARTY. It is not an abuse of discretion to deny an application for a continuance on the ground of the absence of one of the parties holding a one-third interest in the property in dispute, where it does not appear that his testimony or presence was necessary at the trial. *Portland and Seattle R. Co. v. Ladd* 88
2. CONTINUANCE—TRIAL—AMENDMENT—SURPRISE—APPEAL — REVIEW —DISCRETION OF COURT. The discretion of the trial court in denying defendant a continuance, on account of the trial amendment of the complaint, will not be disturbed on appeal, where it appears that, in an action for injuries sustained in the derailment of a street car, the plaintiff, four days before the trial, served notice of an amendment to add an allegation that the accident was caused by a flat wheel, the defendant making no claim that it had a valid defense thereto. *Dunlop v. Seattle, Renton & Southern R. Co*..... 576

CONTRACTS:

See, LIMITATION OF ACTIONS.
For sale of land, see BROKERS, 2.
Transportation of goods, see CARRIERS, 2, 3.
Liquidated damages or penalties, see DAMAGES, 2, 3.
Escrow agreements, see ESCROWS.

CONTRACTS—CONTINUED.

Estoppel by contract, see ESTOPPEL, 2.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Of married women, see HUSBAND AND WIFE, 1, 2.
Of indemnity, see INDEMNITY.
Splitting of causes in action on indivisible contract, see JUDGMENT, 3, 6.
Of marriage, see MARRIAGE.
Party wall agreements, see PARTY WALLS.
Of suretyship, see PRINCIPAL AND SURETY.
Sales of personalty, see SALES.
Specific performance, see SPECIFIC PERFORMANCE.
Rescission of sale of land, see VENDOR AND PURCHASER, 1, 3.
Sale of land, see VENDOR AND PURCHASER.
Venue of action to rescind contract for removal of timber, see VENUE.
Implied obligations to pay for services rendered, see WORK AND LABOR.

1. CONTRACTS — CONSIDERATION — EFFECT OF SEAL — BONDS. In an action upon an indemnity bond under seal, a nonsuit cannot be sustained for mere failure to prove a consideration, since the seal imports a consideration notwithstanding Bal. Code, § 4523, abolishing the use of private seals. *Monro v. National Surety Co*..... 488

CONTRIBUTORY NEGLIGENCE:

Of parents causing death of child, see DEATH.
Of servant, see MASTER AND SERVANT, 8-14.
Of person injured by street car, see STREET RAILROADS.

CONVEYANCES:

In escrow, see ESCROWS.
In fraud of creditors, see FRAUDULENT CONVEYANCES.

CONVICTS:

Pardon, see PARDON.

CORNERS:

Location of, see BOUNDARIES.

CORPORATIONS:

See BUILDING AND LOAN ASSOCIATIONS.
Condemnation of corporate property for public use, see EMINENT DOMAIN, 5, 16-20.
Rights of creditors to intervene in foreclosure of mortgage, see MORTGAGES, 3.
Municipalities, see MUNICIPAL CORPORATIONS.

CORPORATIONS—CONTINUED.

1. CORPORATIONS—STOCKHOLDERS—ACTIONS—RIGHT TO SUE—PARTIES PLAINTIFF. In an action by stockholders of a corporation to compel a reconveyance to the corporation, the complaint is sufficient to show legal capacity of the plaintiff to sue, without any allegation that they had moved the corporation to begin suit, where it appears that the officers and a majority of the trustees were wrongdoers and in control of the corporation and that a demand for corporate action would have been useless. *Williams v. Erie Mountain Consolidated Mining Co.* 360

2. CORPORATIONS—FOREIGN—ARTICLES—PURPOSES — AUTHORITY TO DO BUSINESS. A foreign corporation, whose articles designate trust or agency powers, is not entitled to file its articles with the secretary of state unless it is incorporated in compliance with Laws of 1903, p. 367, regulating the incorporation of such trust companies in this state; since, Const. art. 12, § 7, and Bal. Code, § 4291, provide that foreign corporations shall not be permitted to do business in this state on more favorable conditions than are prescribed by law for similar domestic corporations; and the disavowal of the foreign corporation to do a trust or agency business cannot affect the matter, as there is no method of making the same a matter of record or giving notice thereof. *State ex rel. Amalgamated Republic Mines Co. v. Nichols* 117

COSTS:

See USURY, 3.

Double taxation of attorney's fees as harmless error, see APPEAL AND ERROR, 41.

1. COSTS—PERSONS ENTITLED—SEPARATE DEFENSES—ATTORNEY'S FEES. Defendants, separately appearing and pleading defenses based on different contracts, are each entitled, upon a dismissal, to tax the statutory attorney's fee as costs. *Wittler-Corbin Machinery Co. v. Martin* 123

2. COSTS—SECURITY FOR—POWER TO REQUIRE—COURTS—JURISDICTION. A cost bond filed pursuant to the order of the Federal court is not void because of the fact that the action was dismissed for want of jurisdiction over the subject-matter of the action; as the Federal court has jurisdiction to render a judgment for costs in such a case; and power to require security for costs is incident to the court's power to render judgment for costs. *Carrau v. United States Fidelity & Guaranty Co.* 656

3. COSTS—ON APPEAL. Where defects might have been readily cured by amendment in the court below, and appellant did not call the court's attention thereto, but had a right to first raise them on appeal, no costs will be allowed in the supreme court on reversing the judgment. *Ramsdell v. Ramsdell* 444

COUNSEL:

Misconduct as harmless error, see APPEAL AND ERROR, 42, 44.

COUNTIES:

Proceedings for establishment of highways by county board, see HIGHWAYS, 1-5.

1. COUNTIES—ESTABLISHMENT — STATUTES — CONSTITUTIONAL LAW—PRESUMPTIONS—VALIDITY. Under Const., art. 11, § 3, providing that no new county shall be established which shall reduce any county to a population of less than four thousand, or from a new county of less than two thousand, it cannot be assumed that the legislature has determined the prerequisite population, where the act attempting to create a new county contains provisions for taking a census to determine the population. *State ex rel. Chehalis County v. Superior Court* 453

2. SAME—VALIDITY OF ACT—STATUTES—CERTAINTY. An act to create a new county out of a county bounded by several districts, is void for indefiniteness and uncertainty, where it provides that the petition and proceedings therefor shall be transmitted by the governor to the superior judge of "the next nearest judicial district adjoining the judicial district" in which the county in question is situated, there being nothing to determine what superior judge or district was intended. *State ex rel. Chehalis County v. Superior Court*. 453

3. COUNTIES — COUNTY BOARDS — POWERS — EMPLOYMENT OF ATTORNEYS. The county commissioners are empowered to employ counsel other than the prosecuting attorney to prosecute suits on behalf of the county to secure an escheat, under Bal. Code, § 342, giving them general power to prosecute actions for the county, and Bal. Code, § 466 expressly providing that they may employ counsel other than the prosecuting attorney when they deem it for the best interest of the county. *Reed v. Gormley*..... 355

COURTS:

Admiralty jurisdiction, see ADMIRALTY.

Collection of fees in naturalization of aliens, see ALIENS.

Review of decisions, see APPEAL AND ERROR, 1-8.

Review of questions relating to jurisdiction as dependent on presentation of same in lower court, see APPEAL AND ERROR, 14.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 46, 49.

Rule of decision on appeal, see APPEAL AND ERROR, 46.

Disbarment proceedings, see ATTORNEY AND CLIENT.

Jurisdiction to require security for costs, see COSTS, 2.

Proceedings for alimony, see DIVORCE.

Jurisdiction in injunction proceedings, see INJUNCTION.

Conclusiveness of judgments, see JUDGMENT, 3-7.

Prohibiting judicial proceedings, see PROHIBITION.

COURTS—CONTINUED.

1. COURTS—JURISDICTION—PUBLIC LAND. A state court has no jurisdiction to determine the equities of claimants to public lands by enjoining the prosecution of a claim before the land department or requiring a relinquishment of a claim, when the title is still in the United States and the land office has not determined the right to a patent. *Columbia Canal Co. v. Benham*..... 249

2. COURTS—JURISDICTION—ADMIRALTY. Bal. Code, § 5953, giving liens upon vessels for certain demands, including damages for injuries committed within the state, and § 5954, providing that such liens may be enforced "in all cases of maritime contracts or service" by a suit in admiralty, requires that maritime torts be enforced in admiralty, and state courts have no jurisdiction thereof. *West v. Martin* 417

3. COURTS—JURISDICTION—BOND—EFFECT. Objection to the jurisdiction of the state superior court over an action to enforce a lien for damages against a vessel is not waived by the giving of a bond for the release of the vessel, conditioned to pay any judgment that might be recovered on the cause of action, where the bond is expressly stated to be a substitute for any security or claim the plaintiff might have against the vessel. *West v. Martin*..... 417

COVENANTS:

Party wall agreement as creating covenant running with land, see PARTY WALLS.

CREDITORS:

See FRAUDULENT CONVEYANCES.

CRIMINAL LAW:

See GAMING.

Restraint of the person without lawful authority, see FALSE IMPRISONMENT.

Manslaughter, see HOMICIDE.

Violation of municipal ordinances, see MUNICIPAL CORPORATIONS, 1.

Grant of exemption from punishment, see PARDON.

Trial of civil actions, see TRIAL.

Cross-examination of witnesses, see WITNESSES, 6.

1. CRIMINAL LAW—DECLARATIONS IN PRESENCE OF ACCUSED—ADMISSIONS. *Ante mortem* statements of deceased relating to the issues, made in the presence of the accused, are admissible, where she was at home in another room with the door open within easy hearing, and were made under such circumstances that she would without doubt have replied thereto if she did not wish to acquiesce therein; but statements made after the door between the rooms was closed, while the accused was engaged in conversation, although she might have heard and denied the same, are not made in her presence or under circumstances calling for a reply. *State v. Baruth*..... 283

CRIMINAL LAW—CONTINUED.

2. SAME—RELEVANCY. *Ante mortem* statements of deceased, made in the presence of the accused, are admissible only so far as they relate to the shooting from which death resulted, its immediate cause, and the conduct of the parties at the time which was part of the *res gestae;* and statements of conduct at other times, or irrelevant to the issue, are inadmissible. *State v. Baruth*..... 283

3. CRIMINAL LAW—APPEAL—FAILURE TO REQUEST INSTRUCTION. In a prosecution for homicide, the failure to caution the jury as to admissions by the accused by acquiescence in an *ante mortem* statement made in her presence is not reversible error where no request was made for such instruction. *State v. Baruth*..... 283

4. CRIMINAL LAW—TRIAL—PROVINCE OF COURT—APPEAL — REVIEW — RAPE—EVIDENCE—SUFFICIENCY. The appellate court cannot say, as a matter of law, that the evidence of a prosecuting witness is so far impeached by her own testimony and other witnesses that the same is insufficient to justify a conviction of rape, where it was corroborated, and the jury and trial court found it sufficient. *State v. Katon* 1

CROSS-EXAMINATION:

See CARRIERS, 14; WITNESSES, 6, 7.

CUSTODY:

Of goods in course of transportation, see CARRIERS, 2, 3.

DAMAGES:

For ejection of passenger, see CARRIERS, 14.
Condemnation of property taken for public use, see EMINENT DOMAIN, 5-12, 15, 16, 21.
Opinion evidence as to damages, see EVIDENCE, 4.
Construction or repair of highways, see HIGHWAYS, 5.
For injuries caused by nuisance, see NUISANCE.
Breach of warranty of goods sold, see SALES, 2.
Instructions as to damages for negligence, see TRIAL, 10.
Injuries by flooding land, see WATERS AND WATER COURSES, 2, 3.
Competency of witness as to value of timber destroyed, see WITNESSES, 2.

1. DAMAGES—CERTAINTY. The difficulty of proving damages to growing trees during the period of the statute of limitations is no bar to a recovery of substantial damages. *Park v. Northport Smelting & Refining Co.* 597

2. DAMAGES — LIQUIDATED DAMAGES — PENALTY — CONTRACTS — CONSTRUCTION. A contract for the removal of earth within a certain time at a fixed price per cubic yard, containing a provision that the contractor agrees that a penalty of $10 shall be deducted from his compensation for each and every day that the work continues after

DAMAGES—CONTINUED.

the stipulated time for performance, is a contract for liquidated damages and not a penalty, and evidence of the actual damages sustained is inadmissible. *Erickson v. Green*..... 613

3. SAME—WAIVER. Where a contract for the removal of earth agreed upon liquidated damages for delay in performance, and provided for payment in three equal installments, the first to be paid when the work was half done, payment of the first installment after the time for completion had expired waives the stipulated damages for delay up to the time of such payment. *Erickson v. Green*... 613

4. DAMAGES—INJURIES—EXCESSIVENESS. A verdict for $2,700 for an injury to a steam fitter from stepping into a tank of hot water, whereby his foot was badly burned, is excessive and should be reduced to $1,700, where the injury was not of a permanent character. *Meyers v. Syndicate Heat & Power Co*..... 48

5. DAMAGES—INJURIES—EXCESSIVENESS. A verdict for $8,000 for the loss of the left arm, by a man 27 years of age, is not excessive. *Shea v. Seattle Lumber Co*..... 70

6. DAMAGES—EXCESSIVE VERDICT — APPEAL — REVIEW. A verdict for 5,000 for personal injuries, reduced by the trial court to $3,000, will not be disturbed on appeal, when sustained by the plaintiff's evidence. *Payne v. Whatcom County Railway & Light Co*..... 342

7. DAMAGES — PERSONAL INJURIES — EXCESSIVENESS. A verdict in favor of a minor for $1,119.25 for damages for tearing off one finger and lacerating the thumb and second finger is not excessive. *Adams v. Peterman Mfg. Co*..... 484

8. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS. A verdict upon conflicting evidence for $500 for injuries to an ankle, sustained in jumping from a street car about to collide with another, will not be held excessive, when the court is not justified in disturbing the verdict. *Russell v. Seattle, Renton & Southern R. Co*..... 500

9. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS. A verdict for $500 cannot be said to be influenced by passion or prejudice, where a passenger in a street car collision was knocked down and rendered unconscious, received a cut in the hand, sprained wrist, and bruised leg and knee, and was confined to his home for some considerable time. *Jordan v. Seattle, Renton & Southern R. Co*.... 503

10. DAMAGES—PERSONAL INJURIES — EXCESSIVENESS. A verdict for $3,500 for damages sustained by a woman in a street car collision is not excessive, where it appears that she was standing in a car crowded full, was thrown violently in the mass of passengers, bruised and injured on her side, and about her ribs and spine, and rendered nervous and unable to earn her living, at her former or any other vocation. *Connell v. Seattle, Renton & Southern R. Co.* 510

DAMAGES—CONTINUED.

11. DAMAGES—INJURIES—EXCESSIVENESS. A verdict for $5,000 reduced by the trial court to $3,500, for injuries sustained by a barber, who, nine months after, was seriously crippled and unable to perform labor or follow his usual occupation, will not be set aside on appeal as excessive. *Mooney v. Seattle, Renton & Southern R. Co.* 540

12. DAMAGES—EXCESSIVE VERDICT. A verdict will not be set aside as excessive when it does not appear to have been the result of passion or prejudice. *Jones v. Seattle, Renton & Southern R. Co.*..... 550

13. DAMAGES—INJURIES—EXCESSIVENESS. A verdict for $2,500 for injuries from the crushing of two fingers of a seventeen year old boy, necessitating amputation of one of them, is excessive and should be reduced to $1,500. *Ball v. Peterman Mfg. Co.*..... 653

14. DAMAGES—INJURIES—EXCESSIVE VERDICT. A verdict for $8,000 for injuries to the back, plaintiff being a young man 23 years of age, is excessive and should be reduced to $5,000, where, upon conflicting evidence, it overwhelmingly appeared that the injuries resulted only in neurasthenia instead of myelitis as claimed by defendant. *Robinson v. Spokane Traction Co.*..... 303

15. DAMAGES—EVIDENCE—ADMISSIBILITY—APPEAL — HARMLESS ERROR. In an action for personal injuries resulting in neurasthenia, it is error to exclude defendant's evidence tending to show the effect that the worry and excitement incident to the lawsuit would have upon the plaintiff; but the same may be without prejudice upon a proper reduction of the verdict. *Robinson v. Spokane Traction Co.* 303

16. DAMAGES—EVIDENCE—EXPERT TESTIMONY—WEIGHT. The question of permanent injuries may be submitted to the jury upon the evidence of the plaintiff and nonexperts, although the physicians called as experts did not sustain plaintiff's contention, the weight of all the evidence being for the jury. *Payne v. Whatcom County Railway & Light Co.*..... 342

17. DAMAGES—INJURIES TO PROPERTY—TREES—MEASURE OF DAMAGES. In an action for damages from the destruction of growing trees, the measure of the damages is the loss or diminution in the value of the premises. *Park v. Northport Smelting & Refining Co.*..... 597

18. SAME—PLEADING. Where damages for the destruction of growing trees would be the same whether measured by the value of the timber or of the diminution in the value of the premises, it is immaterial upon what theory the complaint was drawn. *Park v. Northport Smelting & Refining Co.*..... 597

19. DAMAGES—INJURY TO TREES—TRESPASS—LIMITATIONS—EVIDENCE. In an action for damages to growing trees by reason of the operation of a smelter during and for several years prior to the running

DAMAGES—CONTINUED.

of the statute of limitations, the damages cannot be determined by evidence of the value of the land at the time of the commencement of the action as compared with two years previously, where it appears that much of the timber was destroyed without the statutory period, but rotted and decayed within the statutory period. *Park v. Northport Smelting & Refining Co*..... 597

DEATH:

Of grantor as affecting delivery of deed, see ESCROWS, 2.

1. DEATH—ACTION BY PARENT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The negligence of parents in permitting a child six years of age to cross the tracks of a switch yard in front of their home, frequently used by the railroad company, and leaving her there to play unattended, precludes any recovery for the death of the child, who was run over by a train in switching cars. *Vinnette v. Northern Pac. R. Co*..... 320

DEBTOR AND CREDITOR:

See FRAUDULENT CONVEYANCES.

Rights of contract creditors of corporation to intervene in foreclosure of mortgage, see MORTGAGES, 3.

DECISION:

On appeal, see APPEAL AND ERROR, 45-51.

DECLARATIONS:

As evidence in criminal prosecutions, see CRIMINAL LAW, 1, 2.

DEEDS:

Cancellation, see CANCELLATION OF INSTRUMENTS.

In escrow, see ESCROWS.

Absolute deed as mortgage, see MORTGAGES, 1-3.

Cancellation of deed to state lands, see PUBLIC LANDS, 3-5.

Tax deeds, see TAXATION, 3.

As notice to purchaser, see VENDOR AND PURCHASER, 4-5.

DEFENSES:

Right to raise defense of usury, see USURY, 4, 5.

DELAY:

In notice of default as affecting release of surety, see PRINCIPAL AND SURETY, 3.

DELIVERY:

Of goods by carrier, see CARRIERS, 2, 3.

Of deed, see ESCROWS, 1, 2.

Of gift *causa mortis*, see GIFTS, 1.

DEPOSITIONS:

1. DEPOSITIONS—EXAMINATION OF WITNESS—EXCEPTIONS. Upon taking a deposition before a trial judge, where objections are ruled on at the time and exceptions taken, the exceptions need not be renewed at the trial. *Chicago, Milwaukee & St. Paul R. Co. v. Alexander* 131

DEPOSITS IN COURT:

Review of error in withdrawal, necessity of exceptions, see APPEAL AND ERROR, 16.

DESCRIPTION:

Sufficiency in memorandum of conditional sale, see SALES, 3.
In deed or tax receipt, see TAXATION, 3, 4.

DIRECTING VERDICT:

In civil actions, see TRIAL, 3.

DISBARMENT:

Of attorney, see ATTORNEY AND CLIENT.

DISCHARGE:

From liability as surety, see PRINCIPAL AND SURETY, 2.

DISCRETION OF COURT:

Review in civil actions, see APPEAL AND ERROR, 23, 27.
To grant continuance, see CONTINUANCE.
To grant temporary injunction, see INJUNCTION.
Reopening case for further evidence, see TRIAL, 4.

DISCRIMINATION:

By carrier, see CARRIERS, 1.
Special privileges or immunities and class legislation, see CONSTITUTIONAL LAW.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see APPEAL AND ERROR, 4-6.
Waiver of error in rulings on motion, see APPEAL AND ERROR, 30-33.
Dismissal of certiorari proceedings, see CERTIORARI, 2.
Costs on dismissal or nonsuit, see COSTS, 1.
Effect of waiver of nonsuit at trial, see TRIAL, 7.

DIVERSION:

Of water course, see WATERS AND WATER COURSES.

DIVORCE:

Amendment of pleadings to show jurisdiction, see APPEAL AND ERROR, 26.
Liability of husband on wife's contract for attorney's fees, see HUSBAND AND WIFE, 1, 2.

DIVORCE—CONTINUED.

Capacity of divorced persons to marry, see MARRIAGE.

1. DIVORCE—PLEADING—JURISDICTION—RESIDENCE. An allegation of plaintiff's residence in this state for one year, and in the county at the time suit is brought, is essential to jurisdiction in an action for divorce. *Ramsdell v. Ramsdell*..... 444

2. DIVORCE — ALIMONY — PROVISION FOR CHILD — GUARDIAN. Upon granting a divorce to the wife, who is awarded the custody of a minor child, the court may, although there is no property, give judgment for monthly alimony for the support of both wife and child, under Bal. Code, § 5723, authorizing the court to make "provision for the guardianship, custody, support," etc., of a minor child. *Claiborne v. Claiborne*..... 200

3. DIVORCE—DECREE—DIVISION OF PROPERTY. Upon granting a wife a divorce, the court may award all the property, community and separate, to the wife. *Ramsdell v. Ramsdell*..... 444

DOCUMENTS:

As evidence in civil actions, see EVIDENCE, 2.

DOMICILE:

For purposes of divorce, see DIVORCE, 1.
As affecting marriage contract, see MARRIAGE.

DRAFTS:

See BILLS AND NOTES.

DRAINS:

Condemnation of property for drainage purposes, see EMINENT DOMAIN, 21.

DRUGGISTS:

Sale of intoxicating liquors, see INTOXICATING LIQUORS.

EJECTION:

Of passengers, see CARRIERS, 14.

EJECTMENT:

Recovery of land sold for taxes, see TAXATION, 2-5.

1. EJECTMENT—JUDGMENT—IMPROVEMENTS. In ejectment the judgment as to improvements made and taxes paid by the defendant must conform to laws 1903, p. 262. *Bullock v. Wallace*..... 690

EMANCIPATION:

Of infant, right to recover for loss of time in action for injuries, see INFANTS.

EMINENT DOMAIN:

Admission of improper maps as harmless error, see APPEAL AND ERROR, 35.

Maps as evidence of location in condemnation proceedings, see EVIDENCE, 2.

Condemnation of land for county road, see HIGHWAYS.

Effect of *lis pendens* on subsequent purchasers, see LIS PENDENS.

1. EMINENT DOMAIN—PUBLIC USE. The appropriation of land for a county road is necessarily for a public use. *State ex rel. Pagett v. Superior Court* 11

2. EMINENT DOMAIN—PUBLIC USE—RIGHT TO CONDEMN—LOGS AND LOGGING. Condemnation by a boom company of ten feet along the banks of a stream, for the purpose of driving logs by means of artificial freshets, is a public use, although the company had only driven logs for one timber company, whose officers and stockholders were the same as those of the boom company, where it appears that four or five hundred million feet of timber was tributary to the stream, and it was not shown that it all belonged to one company. *State ex rel. Wilson v. Superior Court*..... 397

3. SAME—PROPERTY SUBJECT — RIPARIAN RIGHTS — WATERS USED OR NEEDED. Under Bal. Code, § 4156, condemnation of the rights of abutting owners to the use of the waters of a stream is limited, and cannot include waters used or needed by the riparian owner for his lands then irrigated or which he intends to irrigate within a reasonable time. *State ex rel. Liberty Lake Irr. Co. v. Superior Court* 310

4. EMINENT DOMAIN — LAND DEVOTED TO PUBLIC USE — REASONABLE NECESSITY. A railroad company has the power to condemn a right of way across the lands of a boom company already devoted to a public use, if a reasonable necessity exists therefor; and such necessity is shown where it appears that to go around the defendant's lands would necessitate the building of the road out in the Columbia river, in a strong current, which would be unsafe and very expensive, while the use of defendant's lands as a holding ground for logs would not be entirely destroyed by the condemnation, and there had been occasion for such use only for a few weeks during the last eight years. *State ex rel. Skamania Boom Co. v. Superior Court*..... 166

5. EMINENT DOMAIN — DAMAGES — VALUE IN RELATION TO OTHER TRACTS. In proceedings to widen a public street by condemning a strip of land one foot wide and 394 feet in length, lying between the street on one side and unplatted lands owned by other parties on the other, which had no access to the street, the jury is bound to take into consideration the value of the strip in connection with the adjoining tract of the other parties, and a verdict for nominal damages on the theory that the strip was of no use to the owner in its present situation is unwarranted. *In re East Galer Street*..... 603

EMINENT DOMAIN—CONTINUED.

6. EMINENT DOMAIN — DAMAGES — TO PROPERTY NOT TAKEN—VALUE. In condemnation proceedings, where defendants claimed damages to land not taken valuable as a quarry, for the reason that the stone could not be profitably quarried without taking and throwing it down on the lands taken, and also, as the evidence showed, upon lands owned by the railroad company, the court properly instructed the jury that no damages could be allowed for the injury to the quarry if it could not be profitably worked except by throwing rock upon the lands already owned by the railroad company. *Portland and Seattle R. Co. v. Ladd*..... 88

7. EMINENT DOMAIN—DAMAGES—REMOTENESS—INJURY TO LAND NOT TAKEN. In proceedings to condemn land for a railroad right of way, to be used as an approach to a stationary bridge, authorized by the Federal government over a stream navigable for small craft, it is error to permit the defendants to show damages that would accrue to their remaining lands in case the river is improved and the government requires the substitution of a drawbridge obstructing the shore of such remaining lands, where such prospect is very remote and condemnation is not sought of defendant's shore rights, damages to which can be recovered in another action. *Chicago, Milwaukee & St. Paul R. Co. v. Alexander*..... 131

8. SAME—PROCEEDINGS—CONDITIONS PRECEDENT. Under Bal. Code, §§ 4334, 4335, it is not a condition precedent to condemnation proceedings by a railroad company (except in case of railroad crossings) that the company should attempt to agree with the owner as to the compensation to be paid for land already devoted to a public use. *State ex rel. Skamania Boom Co. v. Superior Court*..... 166

9. SAME. An attempt to agree with the owner as to compensation is not a condition precedent to condemnation proceedings, where it appears that such attempt would be fruitless. *State ex rel. Skamania Boom Co. v. Superior Court*..... 166

10. SAME—PROCEEDINGS—PREREQUISITES—ATTEMPT TO AGREE. Where condemnation proceedings are contested on the ground that the petitioner has no right to condemn, it is immaterial that there was no attempt to agree upon the amount of compensation for the property taken. *State ex rel. Wilson v. Superior Court*..... 397

11. EMINENT DOMAIN — DAMAGES — EVIDENCE — VALUES OF PROPERTY —EXPERTS. A witness not acquainted with values in a certain city, who examines a few manufacturing sites with a view of purchasing or locating in such city, is not qualified as an expert in real estate values in such city. *Chicago, Milwaukee & St. Paul R. Co. v. Alexander* 131

12. SAME—DAMAGES—EVIDENCE—VALUE OF PROPERTY. On the question of the value of land condemned, it is inadmissible to show what price similar land near by is held at by another owner. *Chicago, Milwaukee & St. Paul R. Co. v. Alexander*..... 131

EMINENT DOMAIN—CONTINUED.

13. SAME—VALUE OF PROPERTY—OFFERS. On the question of the value of land condemned, it is error to permit the defendant, on examination in chief, to introduce evidence of offers that had been made for the land. *Chicago, Milwaukee & St. Paul R. Co. v. Alexander* 131

14. SAME—VALUE OF PROPERTY—ORDER OF PROOF—REBUTTAL. Upon an issue as to damages to a tract of land, cut in two by condemnation for a railroad right of way, where the evidence on the part of the defendant shows that the value of the tract for a manufacturing plant is thereby destroyed, it is error to exclude expert evidence in rebuttal to the effect that such a manufacturing plant as referred to by the defendants could be built and successfully operated on the two tracts, that question not having been raised in plaintiff's case in chief. *Chicago, Milwaukee & St. Paul R. Co. v. Alexander*... 131

15. EMINENT DOMAIN—DAMAGES—REMOTENESS—VALUE OF PROPERTY—EVIDENCE—SPECULATIVE USES. In estimating the value of land taken in condemnation proceedings, reference may be had to the uses to which the land is suitable, or may reasonably be expected to be put in the immediate future; but the fact that a river of small depth may be made navigable by the government for large vessels, and the land thereby become a shipping point, is too remote and speculative to be considered in fixing the value of the land, when no dredging plan is shown to any point within two miles of the property. *Chicago, Milwaukee & St. Paul R. Co. v. Alexander*..... 131

16. EMINENT DOMAIN — DAMAGES — MITIGATION—EVIDENCE. Upon an issue as to the damages from the regrade of a street, evidence as to whether buildings, the foundations of which were destroyed, could be moved back or lowered or removed, is admissible. *In re Jackson Street* 243

17. SAME—INSTRUCTIONS—MUNICIPAL CORPORATIONS—LICENSE TO OCCUPY STREET. Upon an issue as to whether damages from the regrade of a street might be mitigated by the temporary removal of the buildings into the street, the court properly refused to instruct that the city could not grant an exclusive franchise for the use of any street, since the city might license the temporary occupancy of the street for such a purpose. *In re Jackson Street*..... 243

18. EMINENT DOMAIN—TRIAL—VIEW BY JURY. A view of premises by a jury may be ordered in condemnation proceedings, under Bal. Code, § 4998, authorizing such views in civil actions; nor is said section limited by the act (Bal. Code, § 783), authorizing a view in condemnation proceedings without making provision for any person to point out the place. *In re Jackson Street*..... 243

19. SAME—VERDICT—SEPARATE FINDINGS. It is only where property is taken, and not where it is damaged, that the jury may be required to make separate findings on the damages to buildings thereon and on the value of the buildings to be removed. *In re Jackson Street* 243

EMINENT DOMAIN—CONTINUED.

20. SAME—TRIAL—RECEPTION OF EVIDENCE. Where the city, at the commencement of the trial, offered the petition and certain documentary evidence to show its right to condemn, it is not necessary to reoffer the same upon taking up the question of damages to any particular property, and the same is in evidence for all purposes. *In re Jackson Street*..... 243

21. EMINENT DOMAIN — DRAINS — PROCEEDINGS UNDER INVALID ACT—CURATIVE STATUTE—DAMAGES. Where a drainage ditch was constructed across lands of the defendants under an act afterwards declared unconstitutional because it had not provided for compensation to the defendants, the legislature may pass a curative act providing for condemnation of a right of way for the ditch theretofore constructed; and in such proceedings the defendants are not entitled to compensation for the ditch on the theory that it was constructed on their premises by the trespassers, where the rights of the parties are adjusted as nearly as possible according to natural justice; since the legislature could protect the equitable interests of the parties constructing the ditch. *Lewis County v. McGeorge*..... 414

22. EMINENT DOMAIN — WATER RIGHTS — IRRIGATION — PROCEEDINGS—PETITION—SUFFICIENCY. In proceedings to condemn the right to water for irrigating purposes, it is not a fatal defect to omit from the petition a statement of the time that the water is to be used, as required by Bal. Code, § 4143, where from other allegations it appears that a perpetual use is desired. *State ex rel. Liberty Lake Irr. Co. v. Superior Court*..... 310

23. SAME—NECESSITY—DEFENSES. In such proceedings, the fact that the petitioner has appropriated and may obtain a large supply from another source will not defeat the condemnation. *State ex rel. Liberty Lake Irr. Co. v. Superior Court*..... 310

24. SAME—LOSS OF RIGHT—NONUSER. The right of condemnation by a boom company is not lost by nonuser of its franchise, for the term of eight months, as provided by Bal. Code, § 4393, where it appears that during such time its dams were operated by a timber company, under a lease, and no public demand made upon it was refused during such time; as nonuser is not thereby established. *State ex rel. Wilson v. Superior Court*..... 397

EMPLOYEES:

See MASTER AND SERVANT.

EQUITY:

See FRAUDULENT CONVEYANCES; INJUNCTIONS; SPECIFIC PERFORMANCE.
Equitable estoppel, see ESTOPPEL.
Equitable relief against judgment, see JUDGMENT, 1.
Determination of adverse claims to real property, see QUIETING TITLE.

ESCROWS:

1. ESCROWS—DEFINITION—INTENTION—DEEDS—DELIVERY — PRINCIPAL AND AGENT. Where nonresident vendors, living at a great distance from this state, agreed to all the terms and conditions of sale, whereby their deed was delivered to a local bank to be by it delivered upon the payment of the price and performance of certain conditions, reserving no control over the papers if the conditions were complied with, and one of the vendors testified that they intended to reserve no control, the transaction amounts to a delivery of the deed in escrow, and not a mere agency. *Bronx Investment Co. v. National Bank of Commerce*..... 566
2. SAME—DEATH OF GRANTOR. The death of one of the grantors in a deed delivered in escrow does not affect the right of the grantee to delivery upon compliance with the conditions of the escrow agreement. *Bronx Investment Co. v. National Bank of Commerce*... 566
3. SAME—ACTIONS—PARTIES DEFENDANT. Where a deed has been delivered in escrow, the remedy of the vendee, upon a refusal to deliver the deed, is against the escrow holder, and there is no defect of parties defendant by reason of failure to join the vendors. *Bronx Investment Co. v. National Bank of Commerce*..... 566

ESTABLISHMENT:

Of boundaries, see BOUNDARIES.
Of counties, see COUNTIES, 1, 2.
Of highways, see HIGHWAYS.

ESTOPPEL:

To allege error, see APPEAL AND ERROR, 43.
To dispute location of boundary, see BOUNDARIES, 2.
By judgment, see JUDGMENT, 2.
Failure to plead former judgment as bar to action, see JUDGMENT, 7.
To assert modification of contract, see VENDOR AND PURCHASER, 3.
Acceptance of damages as estoppel to claim injunctive relief for flooding lands, see WATERS AND WATER COURSES, 3.

1. ESTOPPEL—INCONSISTENT POSITION IN OTHER ACTION—PRINCIPAL AND AGENT—EXISTENCE OF RELATION. Where, in an action to foreclose a mortgage, prosecuted by P. as agent for the plaintiff, P. testified and established that certain wheat, delivered to P. by defendant and pleaded by defendant as a payment, was not received by P. as agent for the mortgagee, and the court entered judgment without allowing any credit for the wheat, in an action against P. for conversion of the wheat, P. is estopped from claiming that he received the wheat as agent of the mortgagee and that the same was credited on the note in the foreclosure suit. *Wees v. Page*..... 213
2. ESTOPPEL—BY ACQUIESCENCE—EVIDENCE—SUFFICIENCY—WORK AND LABOR—IMPLIED CONTRACT. The evidence is not sufficient to show an estoppel to deny an implied contract to pay for grading a lot, where

ESTOPPEL—CONTINUED.

the lot owner refused to enter into a written contract therefor with the party doing the grading, who was a contractor needing the dirt removed, and it appears that the owner notified him on several occasions to cease trespassing on the lot. *Erickson v. Hochbrune*. 33

EVIDENCE:

Sufficiency of evidence of adverse possession, see ADVERSE POSSESSION.

Review of rulings as dependent on presentation of objection in lower court, see APPEAL AND ERROR, 10.

Review of rulings as dependent on exception in lower court, see APPEAL AND ERROR, 12.

Reopening case for further testimony, presentation of grounds for review, see APPEAL AND ERROR, 17.

Necessity for incorporating evidence in bill of exceptions, see APPEAL AND ERROR, 19.

Review of ruling as dependent on prejudicial nature of error, see APPEAL AND ERROR, 34-37.

As to *bona fide* purchaser of draft, see BILLS AND NOTES, 3, 4.

To establish boundaries, see BOUNDARIES, 3.

Of agency, see BROKERS, 1.

In suit for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.

In action for injuries to passenger, see CARRIERS, 5, 9, 14.

For ejection of passenger, see CARRIERS, 14.

In criminal prosecutions, see CRIMINAL LAW, 1, 3, 4.

Of damages, see DAMAGES, 1, 15, 16, 19.

Contributory negligence of parents as cause of child's death, see DEATH.

Depositions, see DEPOSITIONS.

Value of property in condemnation proceedings, see EMINENT DOMAIN, 11-15.

Of estoppel, see ESTOPPEL, 2.

Sufficiency in action for unlawful imprisonment, see FALSE IMPRISONMENT.

Of fraud, see FRAUD.

Oral evidence to take contract without statute of frauds, see FRAUDS, STATUTE OF, 5.

To establish gift, see GIFTS.

To sustain conviction for manslaughter, see HOMICIDE, 1.

To sustain husband's liability on wife's contract for attorney's fees, see HUSBAND AND WIFE, 2.

Community character of property, see HUSBAND AND WIFE, 4, 5.

Separate property of married woman, see HUSBAND AND WIFE, 3, 5, 6.

Certificate of inspection as *prima facie* evidence of compliance with factory act, see MASTER AND SERVANT, 2.

EVIDENCE—CONTINUED.

In action for injuries to servant, see MASTER AND SERVANT, 2, 8, 9, 15, 17, 22-24.
For damages for nuisance, see NUISANCE.
Breach of conditional pardon, see PARDON, 3.
Existence of partnership, see PARTNERSHIP, 1.
Admissibility of evidence under pleadings, see PLEADING, 2.
Objections to evidence on ground of insufficiency of pleadings, see PLEADING, 3.
Of collusion at sale of state tide lands, see PUBLIC LANDS, 2.
In suits to quiet title, see QUIETING TITLE.
In action to recover property under terms of conditional sale, see SALES, 4.
In suit for specific performance, see SPECIFIC PERFORMANCE, 2.
For injuries by street railroads to person on or near tracks, see STREET RAILROADS, 2, 3.
Challenge to sufficiency, see TRIAL, 5-7.
Reception at trial, see TRIAL, 3, 4.
To show usury, see USURY, 1.
Knowledge as affecting competency of witnesses, see WITNESSES, 1.
Gratuitous nature of services rendered to persons in family relations, see WORK AND LABOR.

1. EVIDENCE—LETTERS—ADMISSIBILITY — ATTORNEY AND CLIENT. In an action for professional services, letters showing that the services were rendered are not inadmissible for the reason that they showed the defendant to be engaged in leasing houses for immoral purposes and the reflection upon his character might prejudice the jury against him. *Stern v. Daniel*..... 96

2. EVIDENCE—DOCUMENTARY—MAPS. In a condemnation proceeding, maps showing the location of the railroad are admissible as illustrative of the evidence of the witnesses, where they are shown to be accurate by witnesses who had scaled the maps and compared them with the government field notes, although such witnesses had not surveyed the ground or made the maps. *Portland and Seattle R. Co. v. Ladd*..... 88

3. EVIDENCE — PAROL — SALES — FAILURE OF CONSIDERATION. In an action upon drafts given in payment of the purchase price of goods on a sale evidenced by an obscure order taken by a traveling salesman, evidence of the representations made by the salesman in making the sale is admissible upon an issue as to failure of consideration and fraud. *Johnson County Savings Bank v. Rapp*..... 30

4. EVIDENCE—OPINIONS—INJURY TO TREES—WITNESSES—COMPETENCY. In an action to recover damages for the destruction of growing trees, witnesses qualified as experts on real estate values are incompetent

EVIDENCE—CONTINUED.

to testify as to the loss sustained, where no attempt was made to qualify them as to the market value of the timber. *Park v. Northport Smelting & Refining Co*..... 597

EXAMINATION:

Of witnesses in general, see WITNESSES.

EXCEPTIONS, BILL OF:

Presentation and reservation of grounds of review in record, see APPEAL AND ERROR, 19.

As part of record on appeal, see APPEAL AND ERROR, 20.

EXCESSIVE DAMAGES:

See DAMAGES, 4-14.

EXECUTION:

1. EXECUTION—SALES—TITLE OF PURCHASER—QUIETING TITLE—PERSONS ENTITLED. An execution plaintiff who levies upon and purchases real property which his debtor had previously conveyed by an absolute deed, intended as security, but with power of sale, acquires no greater right than his debtor had; viz., the right of redemption or the right to the surplus after a sale; and therefore an innocent purchaser for value, from the party holding the record title, may maintain an action to quiet his title as against such an execution sale, under Bal. Code, § 5500. *White v. McSorley*..... 18

EXPERT TESTIMONY:

To show permanent condition of injuries, see DAMAGES, 16.

As to value of land in condemnation proceedings, see EMINENT DOMAIN, 11, 14.

FACTORY ACT:

Guarding dangerous machinery, see MASTER AND SERVANT, 2, 4, 6, 10, 15, 20, 24.

FALSE IMPRISONMENT:

1. FALSE IMPRISONMENT — ACTION FOR DAMAGES — EVIDENCE—SUFFICIENCY. In an action for damages for false imprisonment a verdict is properly directed for the defendant, where it appears from plaintiff's testimony that his conduct laid himself open to the arrest complained of, and the evidence fails to show that plaintiff instigated the arrest itself or had knowledge thereof, but had only asked for police protection. *Parker v. Murphy*..... 558

FEES:

Naturalization fees, see ALIENS.

FELONY:

Statute defining gambling as superseding city ordinance, see MUNICIPAL CORPORATIONS, 1.

FILING:

Memorandum of conditional sale, see SALES, 3, 4.

FINDINGS:

See TRIAL.

Review as dependent on exception in lower court, see APPEAL AND ERROR, 11, 16.

Sufficiency as subject for review, see APPEAL AND ERROR, 22.

Review on appeal or writ of error, see APPEAL AND ERROR, 28.

Separate findings in condemnation proceedings, see EMINENT DOMAIN, 19.

Special findings by jury, see TRIAL, 14.

FISH:

Maintenance of fish market as constituting nuisance, see NUISANCE.

FLOWAGE:

Injuries by flowage of water, see WATERS AND WATER COURSES.

FORECLOSURE:

Of mortgage security in action on note, see BILLS AND NOTES, 5.

Of mortgage, see CHATTEL MORTGAGES.

Of tax lien, see TAXATION, 2-5.

FORFEITURES:

Right to avoid certificate or policy of insurance, see INSURANCE.

Of usurious interest, see USURY, 2, 3.

Of conditional sale of land, see VENDOR AND PURCHASER, 2.

FORMER ADJUDICATION:

See JUDGMENT, 3-7.

FRAUD:

As ground for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.

Parol evidence of fraud as invalidating written instrument, see EVIDENCE, 3.

As justification for avoidance of benefit certificate, see INSURANCE.

Of vendor avoiding contract of sale of land, see VENDOR AND PURCHASER, 1.

1. FRAUD—CONSPIRACY—EVIDENCE—SUFFICIENCY. Where it appears that upon a sale of real estate, the vendor, an illiterate person without any business experience, desiring a rescission of the sale, was misled by the fraudulent advice of his attorney that he was under no obligation to complete the sale, and that he could get the land

FRAUD—CONTINUED.

back if he would make a deed to the attorney for the purpose of arranging the matter and also thereby securing the attorney's fee, there is no sufficient evidence that the vendor fraudulently colluded with the attorney to defraud certain banks, to whom the attorney made a deed of the premises as security for loans, especially where the loans to the attorney for the most part already existed, or were made upon the representations of the attorney, and without any examination of an abstract of title, which would have disclosed the inability of the vendor to make the deed to the attorney. *White v. Matzger* 347

FRAUDS, STATUTE OF:

Effect on gift *causa mortis* of contract for sale of land, see GIFTS, 2.

1. FRAUDS, STATUTE OF—SALE OF LAND—MEMORANDUM. Letters from the duly authorized agent of the vendors, containing the names of the parties, description of the property and conditions and terms of the sale, are a sufficient memorandum to satisfy the requirements of the statute of frauds. *Bronx Investment Co. v. National Bank of Commerce* 566

2. FRAUDS, STATUTE OF — SALE OF LANDS — MEMORANDUM OF SALE—SUFFICIENCY. A statement in a receipt for rent agreeing to give the tenants the "option on buying for $12,000," is not a sufficient memorandum of a sale to take the same out of the operation of the statute of frauds, where the property is described as "House 322, Broadway," without reference to state, county or city, and where there was no statement of the consideration for the option or of its duration. *Broadway Hospital and Sanitarium v. Decker*..... 586

3. SAME—PART PERFORMANCE—POSSESSION UNDER A LEASE. One in possession under a written lease cannot urge the possession and the making of improvements as a part performance of an oral agreement for a conveyance to take the case out of the operation of the statute of frauds. *Broadway Hospital and Sanitarium v. Decker* 586

4. FRAUDS, STATUTE OF—SALE OF REAL PROPERTY—PART PERFORMANCE—SUFFICIENCY—SPECIFIC PERFORMANCE. There is no such substantial performance of an oral contract for the sale of land as to take the same out of the operation of the statute of frauds, where it appears that the vendee was to discharge a mortgage and give a second mortgage within ten days, which he neglected to do, except to pay interest and a small part of the principal and taxes for several years, that he cut timber on the land without the owner's consent, receiving net profits sufficient to discharge the mortgage, and that after seven years he took possession by stealth without the owner's consent, after deed made to another; since the vendee is not in a position to demand specific performance. *Case v. Perrigo*..... 675

FRAUDS, STATUTE OF—CONTINUED.

5. SAME—PAROL EVIDENCE. Parol evidence is inadmissible to supply defects in the description of property for the purpose of taking the contract out of the operation of the statute of frauds, where it contained no indicia by reference to which the identity of the premises could be identified, and the description might apply to any city. *Broadway Hospital and Sanitarium v. Decker*..... 586

6. SAME—MEMORANDUM OF SALE—SEPARATE WRITINGS—SUFFICIENCY. Where a receipt for rent, given to the promoter of a corporation, contained also an insufficient agreement for an option, which failed to describe the property or the terms of the option, a subsequent formal lease to the corporation cannot be considered in connection with the option so as to take the case out of the operation of the statute of frauds, where the face of the writings bore no relation to each other, there being no mention of the option in the lease or of the lessee's connection therewith. *Broadway Hospital and Sanitarium v. Decker*..... 586

FRAUDULENT CONVEYANCES:

1. FRAUDULENT CONVEYANCES — RIGHTS OF CREDITORS — PRIOR JUDGMENT OR LIEN—PRINCIPAL AND SURETY. An action to attack or sustain a fraudulent transfer of a debtor's property cannot be maintained by a simple contract creditor prior to obtaining judgment or a specific lien upon the property; and a surety upon a contractor's bond is such a simple contract creditor. *O'Day v. Ambaum*.... 684

FREIGHT:

Carriage of, see CARRIERS, 1-3.

GAMING:

Effect of general law on ordinance prohibiting gambling, see MUNICIPAL CORPORATIONS, 1.

1. GAMING—DESCRIPTION OF OFFENSE. An ordinance prohibiting many specific gambling games, and in general terms any game of chance for money whether or not of the kind mentioned, is broad enough to include the game of "twenty-six" although not enumerated. *Seattle v. MacDonald*..... 298

GENERAL VERDICT:

See TRIAL, 14.

GIFTS:

1. GIFTS—CAUSA MORTIS—INTENTION — DELIVERY—EVIDENCE— SUFFICIENCY. The evidence is sufficient to show intention to make a gift *causa mortis* and delivery, where it appears that, after a protracted illness, and four or five days before his death, the donor and his wife contracted to sell land, making a deed to be placed in escrow until full payment, and that the donor stated that the papers were

GIFTS—CONTINUED.

his wife's, that he would give them to her to be placed in escrow in her name, so that if anything should happen to him she would have a home, and on the same day the papers were handed to his wife; there being no evidence of undue influence, and no creditor complaining thereof. *Davie v. Davie*..... 231

2. SAME—PROPERTY SUBJECT—LAND—FRAUDS, STATUTE OF. A gift, *causa mortis*, of a contract for the sale of land, deed for which was executed by the donor and placed in escrow until full payment, is not an oral gift of real estate or void under the statute of frauds, but is to be treated as personal property, being simply the proceeds from the sale. *Davie v. Davie*..... 231

GOOD FAITH:

Of purchaser, see BILLS AND NOTES, 3, 4.
See VENDOR AND PURCHASER, 6.

GUARANTY:

See INDEMNITY.
Contracts of suretyship, see PRINCIPAL AND SURETY.

GUARDIAN AD LITEM:

In action by or against infants, see INFANTS.

GUARDIANS:

Provisions for on granting decree of divorce, see DIVORCE, 2.

HABEAS CORPUS:

Mode of proceedings to determine question of violation of conditional pardon, see PARDON, 2.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 34-42, 44.
In criminal prosecutions, see CRIMINAL LAW, 3.
In admission of evidence in action for personal injuries, see DAMAGES, 15.
At trial, see TRIAL, 2.

HIGHWAYS:

Appropriation of land for highways, see EMINENT DOMAIN.
Defects in city streets, see MUNICIPAL CORPORATIONS, 5.

1. HIGHWAYS—ESTABLISHMENT—PROCEEDINGS — EMINENT DOMAIN — CERTIORARI—MATTERS REVIEWABLE. Upon certiorari to review an adjudication of public use in a proceeding to condemn land for a county road, the supreme court cannot review the preliminary proceedings had before the board of county commissioners for the establishment of the road, where the board had acquired jurisdiction of the persons and property. *State ex rel. Pagett v. Superior Court* 11

HIGHWAYS—CONTINUED.

2. SAME—FINDINGS BY COMMISSIONERS—COLLATERAL ATTACK. A finding by county commissioners, in a proceeding to establish a county road, that the petition was signed by ten householders of the county residing in the vicinity is conclusive, and cannot be attacked collaterally on certiorari to review an adjudication of public use in proceedings to condemn property for the road. *State ex rel. Pagett v. Superior Court* 11

3. SAME—JURISDICTION—PRESUMPTIONS. Jurisdiction, once acquired to establish a county road, cannot be collaterally attacked, subsequent proceedings being presumed regular. *State ex rel. Pagett v. Superior Court* 11

4. SAME—VIEWERS—NOTICE—STATUTES—AMENDMENT. Under Laws 1901, p. 200, amending the county road law so as to dispense with viewers, and providing that the county surveyor shall perform all the duties of the viewers, the sections of the act relating to the duties and reports of viewers must be interpreted as referring to the county surveyor; and notices drawn accordingly are sufficient. *State ex rel. Pagett v. Superior Court*..... 11

5. HIGHWAYS—ESTABLISHMENT—DAMAGES—EMINENT DOMAIN—CERTIORARI—MATTERS REVIEWABLE. Upon certiorari to review an adjudication of public use, in a proceeding to condemn land for a county road, the awarding or ascertainment of damages cannot be reviewed. *State ex rel. Pagett v. Superior Court*..... 11

6. HIGHWAYS—AUTOMOBILES—INJURIES TO TRAVELERS. An automobile is not such a dangerous agency as to render the owner liable to travelers in the highway for injuries inflicted therewith by a servant irrespective of the scope of the employment, and merely because the owner has made it possible for the servant to take out the machine at his pleasure. *Jones v. Hoge*..... 663

HOMICIDE:

Declarations of injured person as part of *res gestae*, see CRIMINAL LAW, 1, 2.

1. HOMICIDE—MANSLAUGHTER—SELF-DEFENSE—JUSTIFICATION FOR USE OF WEAPON—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a conviction for manslaughter, where it appears from the testimony of the defendant that he was attacked by the deceased, who was unarmed and a much smaller man than himself, that he might have avoided the attack after the altercation commenced by shutting a door and keeping deceased out of his room, which he failed to do, but admitted him to the room, and in the encounter that ensued used an open knife upon the deceased, stabbing him while pushing him out of the room; whether defendant was justified in using a knife being a question for the jury. *State v. Johnson* 227

HOMICIDE—CONTINUED.

2. HOMICIDE—CAUSE OF DEATH—NEGLECT OF PHYSICIAN—DEFENSES. The fact that wounds inflicted by shooting were not skillfully treated or accorded the best medical treatment is no defense to a prosecution for homicide where it is not shown that neglect or unskillfulness was the sole cause of the death. *State v. Baruth*. 283

HUSBAND AND WIFE:

Divorce and judicial separation, see DIVORCE.
Marriage and annulment thereof, see MARRIAGE.
Revocation of will by marriage, see WILLS, 1.

1. HUSBAND AND WIFE—NECESSARIES—DIVORCE—WIFE'S CONTRACT FOR ATTORNEY'S FEES. The husband is not liable upon the contract of his wife to pay attorney's fees for the prosecution of a divorce, the same not being "necessaries" in view of the liberal provisions of Bal. Code, § 5722, relegating the matter to the trial judge. *Zent v. Sullivan* 315

2. SAME—EVIDENCE—SUFFICIENCY. In an action against a husband, after settlement of a divorce case, for attorney's fees contracted for by the wife in the divorce action, a nonsuit is properly granted where the contract shows on its face that it was intended as the individual obligation of the wife in addition to fees allowed by the court, and where there was a failure to show the value of the services, or that there were reasonable and justifiable grounds for the divorce. *Zent v. Sullivan* 315

3. HUSBAND AND WIFE — SEPARATE PROPERTY OF WIFE — EVIDENCE — SUFFICIENCY. Testimony of a wife that property acquired in her name soon after her marriage was paid for in part by $500 received by her by gift, and in part by money saved from her personal earnings, is not sufficient to show that community property entered into the purchase, but it will be inferred that the personal earnings were acquired before marriage, where she was permitted by counsel to state positively the ultimate facts that no part of it was community property and that the husband had no interest therein, and none of it was acquired by their joint efforts, and that he had no property and earned no wages up to that time; and the fact of his doing some work on the property is immaterial. *Donovan v. Olsen*..... 441

4. HUSBAND AND WIFE—COMMUNITY PROPERTY—COMPROMISE OF DISPUTED CLAIMS—PAYMENT IN PART WITH COMMUNITY FUNDS. Real estate is not shown to be the community property of a man and his second wife, where it appears that on the death of his first wife he claimed it as his separate estate, and pending suit to quiet his title, brought against his children claiming a half interest as community property, he remarried and he and his second wife gave their note for $5,300 in payment of a $1,300 mortgage on the property, and $1,000 to each of four children, for a release of their disputed claims

HUSBAND AND WIFE—CONTINUED.

to the property; that such note was paid in part out of the separate funds of the second wife and in part out of the community funds of herself and husband; the remedy of the second wife being a claim against the separate estate of the husband for moneys advanced by the community to procure the release of the disputed claims against his separate estate. *Beneke v. Beneke*..... 178

5. HUSBAND AND WIFE — COMMUNITY PROPERTY — WIFE'S SEPARATE PROPERTY—EVIDENCE—SUFFICIENCY. Findings to the effect that certain real estate was separate property of the wife are sustained by the evidence, where it appears that it was purchased in 1875, largely with funds inherited by the wife, and the husband declared that any community property used in its purchase was intended as a gift to the wife, so that the property could be held by her separately; that the wife twice mortgaged the property, finally conveyed it receiving the full consideration, did not include it in her inventory of her husband's estate, and her acts for twenty-five years since her husband's death were inconsistent with any community claim, and no action was begun by the children to recover an interest until more than six years after the youngest attained majority. *Ballard v. Slyfield*. 174

6. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—EVIDENCE—SUFFICIENCY. Evidence that a lot was purchased by a wife with funds she had at the time of her marriage and had kept about her person and under her immediate control for five years, is sufficient to sustain findings that the property was her separate property; the credibility of her testimony being for the trial court. *Dueber v. Wolfe* 634

IMPLIED CONTRACTS:

See WORK AND LABOR.

IMPLIED REPEAL:

Of statutes, see STATUTES, 3.

IMPRISONMENT:

Restraint of the person without sufficient authority, see FALSE IMPRISONMENT.

IMPROVEMENTS:

Allowance or recovery of compensation in ejectment, see EJECTMENT.
Permitting improvements as creating estoppel, see ESTOPPEL, 2.
Possession and improvements as part performance to satisfy statute of frauds, see FRAUDS, STATUTE OF, 3.
Public improvements, see MUNICIPAL CORPORATIONS, 2-4.
On tide lands belonging to state, see PUBLIC LANDS, 1.

INCUMBRANCES:

See CHATTEL MORTGAGES.

INDEMNITY:

Conclusiveness as against indemnitors of judgment against indemnitee, see JUDGMENT, 2, 4.

Limitation of action against street railway company to recover over under franchise, see LIMITATION OF ACTIONS.

Contracts of suretyship, see PRINCIPAL AND SURETY.

1. INDEMNITY — NEGLIGENCE — MUNICIPAL CORPORATIONS — RECOVERY OVER BY CITY—JUDGMENT—CONCLUSIVENESS. Where trapdoors are negligently maintained in a sidewalk by the abutting owner, whereby a pedestrian is injured, the city and the owner are not *in pari delicto* or joint wrongdoers as between each other; and upon recovery of judgment against the city in an action for the injuries, and payment of the same, the city has a remedy over against the lot owner for the amount paid on the judgment, which is conclusive on the lot owner if due notice to defend the action was given. *Seattle v. Puget Sound Improvement Co.* 22

2. INDEMNITY—JUDGMENT—CONCLUSIVENESS—NOTICE TO DEFEND. A judgment against a city for damages from the negligence of a contractor, who had agreed to save the city harmless therefrom, is conclusive against the contractor where he had notice to defend, as to the amount of damages, the existence of the defect, and want of negligence on the part of plaintiff in the former case. *Seattle v. Saulez* 365

3. SAME—DEFENSES TO ACTION—BARRIERS REQUIRED BY CONTRACT—WAIVER BY CITY INSPECTOR. Where a contractor has agreed with a city to erect barriers over street excavations and save the city harmless from accidents resulting therefrom, he cannot excuse the failure to erect barriers by the fact that a city street inspector was present and gave no directions as to the erection of barriers. *Seattle v. Saulez* 365

4. SAME — JUDGMENT — ADMISSIBILITY AS EVIDENCE — PERSONS NOT NOTIFIED. In an action by a city against an indemnity company to recover over the amount paid on a judgment for personal injuries, the judgment is admissible in evidence for the purpose of showing that it had been recovered against the city for damages for failure to keep the streets in repair, although the surety company was not notified to appear and defend the action. *Seattle v. Saulez*..... 365

INDEPENDENT CONTRACTORS:

Liability of master for injuries to servant of independent contractor, see MASTER AND SERVANT, 5.

INFANTS:

Custody and support on divorce of parents, see DIVORCE, 2.

Care required of master of minor servant, see MASTER AND SERVANT, 9, 12, 18, 19.

INFANTS—CONTINUED.

1. INFANTS—PERSONAL INJURIES — LOSS OF TIME — EMANCIPATION—JUDGMENT—RES JUDICATA. In an action for personal injuries by a minor by his mother as guardian *ad litem*, he may recover for his loss of time since the suit therefor emancipates him; and his mother would be estopped from making claim therefor and concluded by the judgment, although the items were not specifically stated in the complaint, if they were submitted by the charge to the jury. *Hammer v. Caine* 672

INJUNCTION:

Right to injunctive relief for flooding lands, see WATERS AND WATER COURSES, 2, 3.

1. INJUNCTIONS—TEMPORARY—TO PREVENT WASTE—REMOVAL OF TIMBER. The granting of a temporary injunction against the removal of standing timber, is discretionary, where the plaintiff contends that it is necessary to save the property from waste. *Seymour v. La Furgey* 450

INSANE PERSONS:

Testimony as to transactions with persons subsequently incompetent, see WITNESSES, 3.

INSTRUCTIONS:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 13.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 38, 39.

In criminal prosecutions, see CRIMINAL LAW, 3.

In civil actions, see TRIAL, 8-13.

INSURANCE:

1. INSURANCE—LIFE POLICY—DEFENSES—WAIVER OF FORFEITURE—DEMANDING PROOF OF LOSS. Although proofs of death showed that the deceased was killed while engaged in a prohibited occupation contrary to the provisions of the policy, refusal to accept the proofs because not made on the prescribed forms, and the sending of blank forms, does not waive the right of the company to deny liability on account of such violation of the policy, where the forms sent contained express provision that no waiver of such defense should arise from the furnishing and delivery of the blanks. *Elhart v. Pacific Mutual Life Ins. Co.* 659

2. INSURANCE—MUTUAL BENEFIT SOCIETIES — FRAUD — AVOIDANCE OF CERTIFICATE—WAIVER. A mutual benefit society does not waive its right to avoid a benefit certificate for false representations of the deceased concerning former medical treatment and health from the fact that by mistake, and before proofs of loss were made, a clerk

INSURANCE—CONTINUED.

without authority sent notice that the claim was allowed and demanded and received an overdue assessment from the beneficiary, nor from the fact that there was a delay of several months in making an investigation of the claim, where the same was made in a reasonable time and all sums paid were tendered back to the beneficiary and her rights were not prejudiced in any manner. *Burdick v. Modern Woodmen of America*..... 572

INTENT:

To make gift *causa mortis*, see GIFTS, 1.

INTEREST:

See USURY.

INTERROGATORIES:

Refusal to strike as constituting harmless error, see APPEAL AND ERROR, 34.

To jury, see TRIAL, 14.

INTERVENTION:

For purpose of appeal, see APPEAL AND ERROR, 9.

In foreclosure action, see MORTGAGES, 3.

INTOXICATING LIQUORS:

1. INTOXICATING LIQUORS—SALES—STATUTES—IMPLIED REPEAL. The pharmacy act, Laws 1899, p. 222, relating to the drug business and authorizing the sale of spirituous liquors by druggists for medical purposes without a license, does not impliedly repeal Bal. Code, § 2937, relating to the sale and disposal of intoxicating liquors and requiring sales by druggists for medical purposes to be upon the written prescription of a reputable physician; since repeals by implication are not favored, and this rule has special application where the laws relate to different subjects. *Seattle v. Foster*..... 172

IRRIGATION:

Condemnation of waters for, see EMINENT DOMAIN, 3, 22, 23.

ISSUES:

Variance, see PLEADING, 2.

JOINDER:

Of causes of action, see ACTION.

Of defendants in action for delivery of deed, see ESCROWS, 3.

Of causes of action on breach of entire contract, see JUDGMENT, 3, 6.

JOINT TORT FEASORS:

Liability of city for owners maintenance of trapdoor in sidewalk, see INDEMNITY, 1.

JUDGES:

Conduct of judge in civil trial, see TRIAL, 3.

JUDGMENT:

Appealability, see APPEAL AND ERROR, 8.
Review of discretion to vacate judgment, see APPEAL AND ERROR, 27.
Amendment or correction of mandate on appeal, see APPEAL AND ERROR, 46.
On subsequent appeal in same case, see APPEAL AND ERROR, 49.
Decree for alimony, see DIVORCE, 2, 3.
In ejectment, see EJECTMENT.
As condition precedent to suit to set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES.
As evidence in action on indemnity bond, see INDEMNITY, 4.
Conclusiveness on indemnitor of judgment against person indemnified, see INDEMNITY, 1, 2.
Conclusiveness as to claim for loss of time in action by guardian for injuries to minor, see INFANTS.
Sale of land for nonpayment of tax, see TAXATION, 2.

1. JUDGMENT—VACATION—BY ACTION—MERITORIOUS DEFENSE. In an independent action in equity to vacate a judgment, alleged to be void for want of jurisdictional process, it is necessary for the plaintiff to allege that he has or had a meritorious defense, or that the judgment was inequitable, the plaintiff not being a nonresident. *Brandt v. Little*..... 194

2. JUDGMENT—PERSONS CONCLUDED — WITNESSES — INDEMNITY — AUTHORITY OF AGENT TO ISSUE BOND—ESTOPPEL. A member of a transportation company who delivered stock of the company as a pledge for the purpose of securing a charter for the company, is concluded by a judgment against the company foreclosing the pledged stock, where he had knowledge of the suit, was a witness therein and had an opportunity to intervene and make the defense that he was acting as surety only and that the bond, to secure which the pledge was made, was issued by an agent without authority; especially where he had been personally interested in obtaining the bond and had accepted the benefits thereof. *American Bonding Co. v. Loeb* 447

3. JUDGMENT—RES ADJUDICATA—ACTIONS—SPLITTING CAUSES. Judgment in an action for breach of an entire contract, granting the specific performance prayed for by plaintiff, is a bar to a subsequent action by the same plaintiff seeking to reform the original contract, as the two might have been joined in the first instance, and plaintiff cannot split his cause of action. *Collins v. Gleason*..... 69

4. JUDGMENT—RES JUDICATA — PERSONS AND MATTERS CONCLUDED — INDEMNITY. A street railway company, which had agreed to keep a portion of a street in repair and save the city harmless from damages by reason of defects, is not bound by a judgment against the

JUDGMENT—CONTINUED.

city by reason of actual knowledge of the suit, where it received no notice or opportunity to defend; and in an action to recover over from the company the amount of the judgment it is error to exclude evidence on the part of the defendant that the defect was not in a public street. *Seattle v. Northern Pac. R. Co*..... 552

5. SAME—DUTY TO APPEAR AND DEFEND—PLEADING—JUDGMENT—BAR—ESTOPPEL—ACTION OVER—DEFENSES. Where a street railway company, liable over to a city for damages sustained by reason of defects in portions of a street was given notice to appear and defend the action, and refused to do so, but gave notice to the city of a judgment of dismissal rendered in its favor in an action brought against it by the same plaintiff for the same injuries, and requested the city to plead the judgment in bar, and offered to produce evidence to sustain the plea, it is the duty of the city to make such plea, and its failure to do so is a valid defense to any action to recover over from the company. *Seattle v. Northern Pac. R. Co.* 552

6. JUDGMENT—RES JUDICATA—ACTIONS—SPLITTING OF CAUSES. Upon a breach of an indivisible contract to convey certain lands, a judgment for specific performance as to one tract is a bar to another action for specific performance of another tract, where the failure to ask full relief was not due to fraud or mistake; since plaintiff cannot split up his cause of action. *Collins v. Gleason*..... 62

7. SAME—PLEADING—JUDGMENT ON PLEADINGS—ESTOPPEL. Failure of defendant to plead a former judgment as *res judicata* does not estop the defendant from taking advantage of the defense by motion for judgment on the pleadings, where the plaintiff sets up the former adjudication as affirmative matter in a reply. *Collins v. Gleason*. 62

JURISDICTION:

Admiralty jurisdiction, see ADMIRALTY.

Amount in controversy, see APPEAL AND ERROR, 5-7.

Review of questions relating to jurisdiction as dependent on presentation of same in lower court, see APPEAL AND ERROR, 14.

Amendment of pleadings in action for divorce, see APPEAL AND ERROR, 26.

Disbarment proceedings, see ATTORNEY AND CLIENT.

Particular courts, see COURTS.

In divorce, see DIVORCE, 1.

Establishment of county road, collateral attack, see HIGHWAYS, 3.

Want of jurisdiction as ground for opening or vacating judgment, see JUDGMENT, 1.

To issue prohibition, see PROHIBITION.

JURY:

Instructions in criminal prosecutions, see CRIMINAL LAW, 3.
View in condemnation proceedings, see EMINENT DOMAIN, 18.
Appointment of person to conduct jury upon view of premises, see TRIAL, 1, 2.
Instructions in civil actions, see TRIAL, 8-13.

JUSTIFICATION:

For use of weapon in prosecution for manslaughter, see HOMICIDE, 1.

KNOWLEDGE:

Defenses to bills or notes, see BILLS AND NOTES, 3, 4.
Of operators of car as to dangerous position of passenger, see CARRIERS, 12.
Affecting competency of witness, see WITNESSES, 1.

LABOR:

See WORK AND LABOR.

LANDLORD AND TENANT:

Possession and improvements under lease as affecting oral agreement for conveyance, see FRAUDS, STATUTE OF, 3, 6.
Liability of owner for defect in leased premises, see NEGLIGENCE, 1.
Expiration of lease as affecting liability for liens, see PRINCIPAL AND AGENT, 1.

LANDS:

See PUBLIC LANDS.

LAW OF THE CASE:

Decision on appeal, see APPEAL AND ERROR, 49.

LEGISLATURE:

Regulation of pilotage laws, see PILOTS.

LETTERS:

Admissibility to show services performed by attorney, see EVIDENCE, 1.
As sufficient memorandum to satisfy statute of frauds, see FRAUDS, STATUTE OF, 1.
As privileged communications, see WITNESSES, 4.

LICENSES:

To occupancy of street as mitigation of damages, see EMINENT DOMAIN, 17.
Sale of intoxicating liquors, see INTOXICATING LIQUORS.

LIENS:

For taxes paid, see APPEAL AND ERROR, 45.
Of carrier for freight, see CARRIERS, 3.
Mortgages, see CHATTEL MORTGAGES, 1.
For taxes paid, see TAXATION, 4.

LIFE INSURANCE:

See INSURANCE.

LIMITATION OF ACTIONS:

Time for taking appeal or other proceeding for review, see APPEAL AND ERROR, 18.
As affecting claim for damages to growing timber, see DAMAGES, 19.
Against surety, see PRINCIPAL AND SURETY, 4.

1. LIMITATION OF ACTIONS—CONTRACT OR TORT—INDEMNITY—LIABILITY OVER UNDER FRANCHISES. Where street railway franchises contained conditions whereby the company agreed to keep certain portions of streets in repair, and to save the city harmless from the payment of damages growing out of or in any way connected with the franchises, an action by the city to recover over the amount of a judgment for damages caused by defects in the streets is not based upon the common law liability making the city and the company joint tort feasors; and such action, therefore, will not be barred by the statute of limitations in two years, but the six-year or three-year limitation for actions on contract applies. *Seattle v. Northern Pac. R. Co*..... 552

2. SAME—ACTUAL RIGHT OF ACTION—INDEMNITY—JUDGMENT—EFFECT OF APPEAL. Where a city is indemnified by provisions of a franchise from damages for defects in certain portions of the street, the statute of limitations does not begin to run upon recovery of a judgment for damages against the city, where the cause was appealed, but only from the date of the affirmance of the judgment in the supreme court or perhaps from the date of its payment by the city. *Seattle v. Northern Pac. R. Co*..... 552

LIQUIDATED DAMAGES:

See DAMAGES, 2, 3.

LIS PENDENS:

1. LIS PENDENS—EMINENT DOMAIN. Bal. Code, § 4887, authorizing the filing of a *lis pendens*, in all "actions affecting the title of real property," applies to condemnation proceedings, and subsequent purchasers are bound by the proceedings. *Portland and Seattle R. Co. v. Ladd*..... 88

LOAN ASSOCIATIONS:

See BUILDING AND LOAN ASSOCIATIONS.

LOCAL ACTIONS:

See VENUE.

LOCAL ASSESSMENTS:

For local improvements, see MUNICIPAL CORPORATIONS.

LOGS AND LOGGING:

Condemnation by boom company, see EMINENT DOMAIN, 2, 24.

MACHINERY:

Liability of employer for defects, see MASTER AND SERVANT, 5, 8, 16, 20.

Sale of, see SALES.

MANDATE:

To lower court on decision on appeal or writ of error, see APPEAL AND ERROR, 50.

MANSLAUGHTER:

See HOMICIDE.

MAPS:

Admissibility in evidence, see EVIDENCE, 2.

MARITIME TORTS:

Admiralty jurisdiction, see ADMIRALTY.

MARRIAGE:

Revocation of will by marriage, see WILLS, 1.

1. MARRIAGE—VALIDITY—PLACE OF CONTRACT — DIVORCE — RIGHT TO REMARRY—STATUTES—EXTRA-TERRITORIAL FORCE. Laws 1893, p. 225, prohibiting divorced parties from remarrying within six months after the decree, either within or without the state, renders a remarriage during such period void, if contracted in this state, or if contracted in a foreign country by persons domiciled in this state with the purpose of evading the laws of this state; but if the parties were, at the time of the remarriage, domiciled in the foreign country, the marriage would be valid here if valid in such country; our statute having no extra-territorial force as to marriage by nonresidents. *State v. Fenn*..... 561

MARRIED WOMEN:

See HUSBAND AND WIFE.

MASTER AND SERVANT:

See WORK AND LABOR.

Liability of carrier for assault by servant, see CARRIERS, 13.

Liability of carrier for injuries to passengers by servants, see CARRIERS, 13.

MASTER AND SERVANT—CONTINUED.

Hiring county employees, see COUNTIES, 3.
Personal injuries, excessive damages, see DAMAGES, 4, 5, 7, 13.
Injury to traveler by automobile driven by servant, see HIGHWAYS, 6.

1. MASTER AND SERVANT—RELATIONSHIP—QUESTION FOR JURY. Where the owner of a building employed a steam fitter to make repairs in a building, whether or not another steam fitter in the employ of the other, who was sent to do the work, is a servant of the owner of the building or of an independent contractor, is usually a question for the jury. *Meyers v. Syndicate Heat & Power Co*..... 48

2. MASTER AND SERVANT—FACTORY ACT—CERTIFICATE OF INSPECTION—EVIDENCE. The certificate issued by the commissioner of labor upon the inspection of a factory is only *prima facie* evidence that dangerous machinery therein has been guarded in compliance with the factory act. *Noelle v. Hoquiam Lumber & Shingle Co*..... 519

3. MASTER AND SERVANT—PAYMENT OF WAGES—STATUTORY REGULATION. Laws 1905, p. 219, making it unlawful to issue orders or checks in payment of wages unless redeemable at face value, "without discount, in cash or on demand," and providing that when an employee shall cease to work, he shall be "forthwith paid in cash or by order redeemable in cash at its face value on presentation," is not violated by the issuance of a due bill dated March 16, 1907, reciting "Due G. G. Pickett or order on 4-15-1907 (meaning April 15, 1907), eight dollars for wages," and by refusal to pay the same on demand, where it does not appear that the laborer had ceased to work; since the first part of the statute is complied with by issuance of the order payable in cash, and the last part requires payment on demand only when the laborer has ceased to work. *State v. Chehalis Furniture Mfg. Co*..... 378

4. SAME—VERDICT IN FAVOR OF COEMPLOYEE AS DISCHARGE OF MASTER. Where a master and his superintendent are jointly sued for negligence in failing to guard dangerous machinery as required by the factory act, a separate verdict in favor of the superintendent does not discharge the master or preclude a verdict against him, since the statute imposes the imperative duty upon the master and not upon the superintendent. *Johnson v. Far West Lumber Co*.. 492

5. MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE—SERVANT OF INDEPENDENT CONTRACTOR. The owner of a building is liable to the servant of a steam fitter engaged to do repair work in the building, for negligence in leaving exposed an unguarded hot water tank into which the servant fell while in the discharge of his duties, without contributory negligence or notice of the tank; since he is bound to maintain his premises in a reasonably safe condition and furnish a safe place to work, both as to his own servants or servants of an independent contractor invited to work there. *Meyers v. Syndicate Heat & Power Co*..... 48

MASTER AND SERVANT—CONTINUED.

6. MASTER AND SERVANT—INJURIES—GUARDING MACHINERY—FACTORY ACT. A master cannot escape liability from failing to guard dangerous machinery from the fact that a proper safeguard had been provided but was temporarily removed, where it was not the plaintiff's duty to see that the same was adjusted. *Johnson v. Far West Lumber Co.* 492

7. MASTER AND SERVANT—INJURIES—SAFE PLACE—WARNING—NEGLIGENCE OF FOREMAN. A master is liable for injuries received by a woodsman by being struck by a falling limb, where it appears that he was set to work by the foreman to saw down a tree, and while so engaged, the foreman, without giving the customary warning of a falling tree, fell another tree in the vicinity which broke off the limb falling on the plaintiff before he could seek a place of safety. *Curtin v. Clear Lake Lumber Co.*..... 260

8. MASTER AND SERVANT—INJURIES—DEFECTIVE APPLIANCES—PROMISE TO REPAIR—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTIONS FOR JURY. In an action by an employee for personal injuries sustained while cleaning a chute beneath an edger, with a defective appliance (a long stick), after complaint made and under a promise to provide a suitable appliance, the questions whether the plaintiff continued his work for an unreasonable time after the promise to repair, and whether he was guilty of contributory negligence, are for the jury, where it appears that the injury occurred within two days after the promise was given, and plaintiff had continued work relying upon the promise; that the stick used was provided for that purpose, plaintiff had seen others using it, and there was no evidence that a larger stick was available, and plaintiff testified that he used it with the utmost care; and that the plaintiff had no control over the machinery and it was not customary to stop the machinery while cleaning out the chute. *Shea v. Seattle Lumber Co.*..... 70

9. MASTER AND SERVANT—INJURY TO SERVANT—YOUTHFUL EMPLOYEES—FAILURE TO INSTRUCT—CONTRIBUTORY NEGLIGENCE—ASSUMED RISKS—EVIDENCE—QUESTION FOR JURY. In an action by an employee, a boy eighteen years of age, who was injured while working with an inexperienced assistant sixteen years of age, in operating, for the first time, a ripsaw in a box factory, the questions of plaintiff's contributory negligence, and whether he assumed the risks, and of defendant's negligence in placing an incompetent co-employee at work with plaintiff, and in not instructing or warning the plaintiff and his co-employee as to the work and dangers, are for the jury, where it appears that the plaintiff had never run the saw and protested against doing the work for want of experience, but was ordered to do so by the foreman, and where the foreman placed a boy sixteen years of age, who had never worked in a mill before that day, at work with him as an assistant at dangerous work requiring care and judgment, without giving any instructions as to how the work

MASTER AND SERVANT—CONTINUED.

should be done, and plaintiff was injured through the removal, in an improper manner, of material from the saw by the assistant, concerning which no warning or instructions were given either of them. *Cox v. Capitol Box Co.* 148

10. SAME — UNGUARDED MACHINES — CONTRIBUTORY NEGLIGENCE. An employee who works about machinery after having notice that it is not guarded as required by the factory act, the risk of which condition he does not assume, is not thereby guilty of contributory negligence, nor precluded from a recovery unless the injury is caused by a negligent act of his own, and not alone by the dangers of his situation. *Johnson v. Far West Lumber Co.* 492

11. SAME. An operator of a sticker who, in reaching up for a strap, raises his foot, so that it comes in contact with an unguarded saw under the table, is not thereby guilty of contributory negligence, as a matter of law. *Johnson v. Far West Lumber Co.* 492

12. SAME — CONTRIBUTORY NEGLIGENCE — WARNING — YOUTHFUL EMPLOYEE. A seventeen year old boy is not guilty of contributory negligence, as a matter of law, in failing to get out of the way of a log, when he was standing with his back to the sawyer, greasing a wedge under one end of the log as directed, and the sawyer put the machinery in operation rolling the log without giving any warning. *Ball v. Peterman Mfg. Co.* 653

13. MASTER AND SERVANT — ACTIONS — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE. In an action for personal injuries, it is error to instruct that the plaintiff cannot recover if his own negligence contributed approximately to the injury, the rule being that there must be want of ordinary care on the part of the plaintiff. *Gage v. Springston Lumber Co.* 141

14. SAME—CONTRIBUTORY NEGLIGENCE. In an action for personal injuries it is error to instruct, on the subject of contributory negligence, that the plaintiff cannot recover if he did "any thing" that "in any way" contributed to the injury. *Gage v. Springston Lumber Co.* 141

15. SAME—EVIDENCE—RELEVANCY—STATEMENTS OF THIRD PERSONS — INTENTIONS OF MASTER. Evidence of discussions between the appellant's foreman and a deputy factory inspector as to the propriety of guarding machinery, and of the master's future intentions, in inadmissible upon an issue as to whether a guard was necessary. *Adams v. Peterman Mfg. Co.* 484

16. MASTER AND SERVANT — INJURIES—SAFE APPLIANCE—EVIDENCE — PRIMA FACIE CASE. That a steel cable, furnished by a master to be used for a particular purpose, broke when used for that purpose, in a proper manner, is sufficient evidence to make out a *prima facie* case of negligence on the part of the master in furnishing or using the cable. *LaBee v. Sultan Logging Co.* 57

MASTER AND SERVANT—CONTINUED.

17. SAME—PLEADING—CONCLUSIONS. A general allegation that a master failed to provide a safe place to work, following specific allegations of the acts committed, is a conclusion only, and does not admit evidence of negligence not covered by the specific charge. *LaBee v. Sultan Logging Co.*..... 57

18. SAME—YOUTHFUL EMPLOYEE—DEGREE OF CARE. In an action for personal injuries sustained by a youthful employee, it is error to instruct that the plaintiff cannot recover if he received the injury in consequence of failing to observe reasonable instructions given to him, where no explanation is given as to what were reasonable instructions considering his youth and inexperience, except that the standard for his care was fixed in another instruction as such reasonable care as would be exercised by an ordinarily prudent person; since he was entitled to a more specific statement of the duties of an employer of children. *Gage v. Springston Lumber Co.*..... 141

19. SAME—ASSUMED RISKS—YOUTHFUL EMPLOYEE. In an action for injuries sustained by a youthful employee, it is error to give an instruction as to assumed risks which would be applicable to an adult employee, without making any reference to plaintiff's youth. *Gage v. Springston Lumber Co.*..... 141

20. SAME — UNGUARDED MACHINES — ASSUMPTION OF RISK. An employee does not assume the risk from the failure of the master to guard machinery as required by the factory act. *Johnson v. Far West Lumber Co.*..... 492

21. MASTER AND SERVANT—INJURIES—ASSUMPTION OF RISK—DANGERS—METHOD OF WORK. A servant assumes the risk of injury from an appliance whereby heavy electric motors were lifted and suddenly lowered by releasing a crank, causing the crank to revolve rapidly while still held by the employee, where it appears that he had worked with the appliance every day for two months, and knew of the danger and that a man had recently been injured by the rapid revolutions of the crank, there being nothing obscure or complicated about it. *Raven v. Seattle Electric Co.*..... 637

22. MASTER AND SERVANT—NEGLIGENCE OF MASTER—STARTING MACHINERY WITHOUT WARNING—EVIDENCE—SUFFICIENCY. Whether a sawyer was guilty of negligence in starting machinery without warning, whereby a log was rolled onto the plaintiff's hand while he was greasing a wedge as directed by the sawyer, is for the jury, where there was evidence that the plaintiff was acting as directed, and the log was rolled without warning him, and that the ropes controlling the machinery were twisted so that they could not be intelligently operated. *Ball v. Peterman Mfg. Co.*..... 653

23. SAME—WARNING—EVIDENCE—QUESTION FOR JURY. Upon an issue as to whether a warning of danger was given to a servant, the question is for the jury where the evidence of two witnesses for the de-

MASTER AND SERVANT—CONTINUED.

fendant that plaintiff had admitted a warning is flatly denied by the plaintiff, and there is a sharp conflict in the testimony. *Curtin v. Clear Lake Lumber Co.*..... 260

24. MASTER AND SERVANT — INJURIES — GUARDING MACHINERY — QUESTIONS FOR JURY. Where there was competent testimony that cutter heads in a grooving machine could have been practically and efficiently guarded, under the factory act, the questions of credibility of the evidence, and whether they should have been guarded, are for the jury. *Adams v. Peterman Mfg. Co.*..... 484

25. MASTER AND SERVANT—INJURY TO THIRD PERSON—NEGLIGENCE OF SERVANT—SCOPE OF EMPLOYMENT. The owner of an automobile is not liable to one who was run over by his incompetent chauffeur, where the machine was being operated without the knowledge or authority of the owner on a personal errand of the servant; since the act was not within the scope of the servant's employment. *Jones v. Hoge*..... 663

MEASURE OF DAMAGES:

See DAMAGES, 17.

MEMORANDA:

Required by statute of frauds, see FRAUDS, STATUTE OF, 1, 2, 6.
As notice of conditional sale, see SALES, 3.

MINORS:

See INFANTS.

MISCONDUCT:

Of attorney, ground for disbarment, see ATTORNEY AND CLIENT.
Of party ground for new trial, see NEW TRIAL.

MITIGATION:

Evidence to mitigate damages, see EMINENT DOMAIN, 16.

MODIFICATION:

Of contract for sale of land, see VENDOR AND PURCHASER, 3.

MORTGAGES:

Attachment of mortgaged property, see ATTACHMENT.
Foreclosure as condition precedent to action on note, see BILLS AND NOTES, 5.
Of personal property, see CHATTEL MORTGAGES.
As notice to subsequent purchasers, see VENDOR AND PURCHASER, 5.

MORTGAGES—CONTINUED.

1. MORTGAGES—DEED AS MORTGAGE—CONTRACT TO RECONVEY—VENDOR AND PURCHASER—OPTIONS—CONDITIONAL SALE. Where a mortgagor deeds the mortgaged property to the mortgagee, who surrendered the notes, cancelled the mortgage, took possession of the property, giving back an agreement to reconvey to the mortgagor for a certain sum at any time within two years, leaving it optional with the mortgagor to repurchase the same, the deed is absolute and not a mortgage, as the relation of debtor and creditor ceases to exist; and the agreement to convey is an option that expires at the time fixed, and not a conditional sale, although alluded to as such, and time was not made of its essence. *Neeson v. Smith*..... 386

2. MORTGAGES — ASSIGNMENT — RECORD — SATISFACTION. Under Bal. Code, § 4565, authorizing satisfaction of a mortgage by an assignee after record of his assignment, the purchaser of the property may rely on such a satisfaction, without requiring production of the negotiable paper which the mortgage secured. *Christenson v. Raggio* 468

3. MORTGAGES—FORECLOSURE—CORPORATIONS—INSOLVENCY—PARTIES—RIGHT TO INTERVENE. Upon an action to foreclose a mortgage upon leasehold estates held by an insolvent corporation, and the appointment of a receiver for the corporation, the lessors of the property in question, who had claims against the corporation and had commenced an action to forfeit one of the leases for nonpayment of rent, in which the receiver had intervened, are not entitled to intervene in the foreclosure suit, and defend against the notes and mortgage as fraudulent, as they are simple contract creditors of the corporation without interest in the subject-matter of, and unaffected by, the foreclosure suit, they not having reduced their claims to judgment or proved the same before the receiver. *Hindman v. Colvin* 382

MOTIONS:

For direction of verdict, see TRIAL, 7.

MUNICIPAL CORPORATIONS:

License to occupy street in mitigation of damages, see EMINENT DOMAIN, 17.

Appropriation of land for highways; see EMINENT DOMAIN, 5, 16-20.

Liability of person causing defects in streets to indemnify city for damages recovered by person injured, see INDEMNITY.

Limitation of action to recover over under franchise of railway company, see LIMITATION OF ACTIONS.

Prohibition of trial for violation of void ordinance, see PROHIBITION.

Ordinance as defense in action for breach of warranty on sale of scales, see SALES, 1.

Collision of street cars with persons or vehicles on track, see STREET RAILROADS.

MUNICIPAL CORPORATIONS—CONTINUED.

1. MUNICIPAL CORPORATIONS — ORDINANCES — SUPERSEDING BY STATE LAW—CRIMINAL LAW—OFFENSES—GAMING. A city ordinance making gambling a misdemeanor is not superseded by a general state law making the acts defined in the ordinance a felony. *Seattle v. MacDonald* 298

2. MUNICIPAL CORPORATIONS — IMPROVEMENTS—ASSESSMENT OF BENEFITS—METHOD OF ASSESSMENT. An assessment of benefits, to be made according to benefits received, is not erroneous from the fact that the commissioners considered the value of the respective lots, and assessed some of them higher than others in the same vicinity, the percentage of benefit upon the values being the same, where that was only one of the elements taken into consideration in estimating the benefits, and where it is not shown that the lots in question were assessed more than they were benefited and more than their proportionate share of the cost of the improvement. *In re Western Avenue* 42

3. MUNICIPAL CORPORATIONS—IMPROVEMENTS— ASSESSMENTS — BENEFITS. The fact that a street was so improved that a street railway company seeks to extend its line thereon may be shown as an element of special benefit to the property in the district. *In re Harvard Avenue North*..... 535

4. SAME—PROPERTY BENEFITED—EXTENT—COMMISSIONER'S DECISION. The assessment of benefits by commissioners being reasonably fair, their decision as to the extent of the property benefited should not be disturbed, Laws 1893, p. 196, § 22, placing the duty of determining the district upon the commissioners. *In re Harvard Avenue North* 535

5. MUNICIPAL CORPORATIONS—CLAIMS—NOTICE—DEFECT IN STREET—SUFFICIENCY OF DESCRIPTION. A claim for personal injuries describes a defect in a street with reasonable certainty and sufficiently directs the city officers thereto, where a large hole is erroneously located on the west side of a street, the notice further stating that it was near No. 228, which was a two story building on the east side, the street being only forty-six feet in width; it appearing that the city officers claimed to have made no examination of the east side, and took photographs not of the street, but of the west side only. *Ellis v. Seattle* 578

MURDER:

See HOMICIDE.

MUTUAL BENEFIT SOCIETIES:

See INSURANCE, 2.

NATURALIZATION:

See ALIENS.

NAVIGABLE WATERS:

Admiralty jurisdiction to enforce remedy for maritime torts, see ADMIRALTY.

Disposal of state tide lands, see PUBLIC LANDS.

NECESSARIES:

Liability of husband for wife's contract for attorney's fees in action for divorce, see HUSBAND AND WIFE, 1, 2.

NECESSITY:

For condemnation for public use, see EMINENT DOMAIN, 4, 23.

NEGLIGENCE:

Personal injuries to passengers in general, see CARRIERS, 4-11.

Causing death, see DEATH.

Of physician as defense to prosecution for manslaughter, see HOMICIDE, 2.

Act of servant constituting negligence as against third persons, see MASTER AND SERVANT, 25.

Care required of master as to minor servant, see MASTER AND SERVANT, 9, 12, 18, 19.

Risks assumed by servant, see MASTER AND SERVANT, 9, 10, 19-21.

Contributory negligence of servant, see MASTER AND SERVANT, 8-14.

Of employers, see MASTER AND SERVANT.

Injuries from defects in streets, see MUNICIPAL CORPORATIONS, 5.

In operation of street railroads, see STREET RAILROADS.

Of person injured by street car, see STREET RAILROADS.

1. NEGLIGENCE — DANGEROUS PREMISES — LEASE — PARTIES LIABLE — OPENING IN SIDEWALK. The owner of a building is liable for negligence in maintaining trapdoors over an areaway, placed in the sidewalk exclusively for the benefit of the building, where the building was in his control, although parts of it were leased to other parties. *Seattle v. Puget Sound Improvement Co*..... 22

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEW TRIAL:

Denial of motion for as affecting time for appeal, see APPEAL AND ERROR, 18.

Review of discretionary ruling on motion, see APPEAL AND ERROR, 23.

Scope of after remand by appellate court, see APPEAL AND ERROR, 48.

Objections to conduct of former trial as harmless error, see TRIAL, 2.

1. NEW TRIAL—GROUNDS—MISCONDUCT OF PARTY. It is not misconduct on the part of the plaintiff, in a personal injury case, which would warrant a new trial, that, during an extended argument to

NEW TRIAL—CONTINUED.

the jury on behalf of the defendant, plaintiff, who was very nervous as a result of her injuries, burst into a crying spell, and was taken out of court in view of the jury. *Connell v. Seattle, Renton & Southern R. Co.*..... 510

NONUSER:

Of right of condemnation, see EMINENT DOMAIN, 24.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

As determining validity of *ex parte* appointment of receiver, see APPEAL AND ERROR, 1.
In action on indemnity bond, see INDEMNITY, 2, 4.
Notice of pendency of action, see LIS PENDENS.
To master of defects in appliances, see MASTER AND SERVANT, 8
Of assignment and satisfaction of mortgage, see MORTGAGES, 2.
Defects or obstructions in street as affecting liability for negligence, see MUNICIPAL CORPORATIONS, 5.
Delay in notice of default as affecting release of surety, see PRINCIPAL AND SURETY, 3.
In foreclosure of delinquency tax certificate, see TAXATION, 2.
Affecting *bona fides* of purchaser of land, see VENDOR AND PURCHASER, 4-6.

NUISANCE:

1. NUISANCE—SUFFICIENCY OF EVIDENCE. The evidence is sufficient to show a nuisance in maintaining a fish market in an improper and obnoxious manner, where the evidence of many witnesses from the immediate vicinity was to the effect that offensive fumes and odors from shellfish, boiled or stored in an improper manner, permeated the atmosphere, and the same was not disputed except by negative testimony of persons occasionally in the market; and it was error to dismiss an action to abate the same. *Asia v. Pool*..... 515

2. SAME — DAMAGES — EVIDENCE — SUFFICIENCY. The plaintiff, conducting a mercantile business, should not be denied damages from a nuisance in the maintenance of a fish market in an improper and obnoxious manner from the fact that he cannot state definitely the amount of loss sustained, where it appeared that offensive odors from the improper boiling or storing of shellfish permeated his goods, materially interfered with his trade, and the sales and volume of his business fell off largely, and testimony was given as to the value of goods carried in stock and the volume of business done before and after the location of the market. *Asia v. Pool*..... 515

NUNCUPATIVE WILLS:

See WILLS, 2, 3.

OBJECTIONS:

At trial, see TRIAL.

OBSTRUCTIONS:

Of water course, see WATERS AND WATER COURSES.

OFFICERS:

Duties of county surveyor in proceedings to establish highway, see HIGHWAYS, 4.

Increase of salary during term of office, see STATUTES, 3.

1. OFFICERS — COMPENSATION — CONSTITUTIONAL LAW — INCREASE OF SALARY. Where the commissioner of public lands (an office created by the constitution) was elected for the term of four years and served for two years, drawing salary under general appropriation acts which, for ten years theretofore, allowed a salary of $2,000 per annum, his salary cannot be increased during his term of office by a general act fixing his compensation at $3,000, even if the same were the first general act fixing any salary for such officer. *State ex rel. Ross v. Clausen*..... 607

OPINIONS:

In civil actions, see EVIDENCE, 4.

OPTION:

Construction of agreement to reconvey to mortgagor, see MORTGAGES, 1.

ORDERS:

Appealable orders, see APPEAL AND ERROR, 1-6.

ORDINANCES:

Prohibition of gambling, description of offense, see GAMING.

Municipal ordinances, see MUNICIPAL CORPORATIONS, 1.

Municipal ordinance as defense in action for breach of warranty, see SALES, 1.

PARENT AND CHILD:

Actions for wrongful death of child, see DEATH.

PARDON:

1. PARDONS—CONDITIONS — AUTHORITY OF GOVERNOR — REVOCATION — STATUTES—CONSTRUCTION. Under Bal. Code, § 6997, authorizing conditional pardons to be granted by the governor, on such limitations as he may think proper, the provision that he may "issue his warrant to carry into effect such pardon," is not limited to the issuance of the warrant granting the pardon, but reposes power in the gov-

PARDON—CONTINUED.

ernor to issue a warrant revoking a pardon which expressly provides that violation of its conditions shall cause its revocation, in the absence of any other statutory provision for determining when the conditions are violated. *Spencer v. Kees*..... 276

2. SAME—HABEAS CORPUS—MODE OF TRIAL. If a prisoner, rearrested after release on a conditional pardon, is entitled to trial in *habeas corpus* proceedings to determine whether he has violated the conditions of the pardon, he cannot complain if he is awarded a trial before the court and the burden of proof is placed on the state. *Spencer v. Kees* 276

3. SAME—BREACH OF CONDITIONS—EVIDENCE—SUFFICIENCY. A prisoner who is pardoned upon condition that he should be placed under the care and surveillance of Dr. B., and that he should remain with and be supported by his relatives as long as he lives, is shown to have violated the conditions of the pardon where he remained with his relatives only a few days, was permitted to support himself, was married, visited houses of prostitution and frequently became intoxicated. *Spencer v. Kees*..... 276

PAROL AGREEMENTS:

Effect and requirements of statute of frauds, see FRAUDS, STATUTE OF, 3, 4.

PAROL EVIDENCE:

See EVIDENCE, 3.

To take contract out of operation of statute of frauds, see FRAUDS, STATUTE OF, 5.

PARTIAL INVALIDITY:

Effect of partial invalidity of statutes, see STATUTES, 1.

PARTIES:

Persons entitled to appeal, see APPEAL AND ERROR, 9.

Entitled to allege error, see APPEAL AND ERROR, 24.

Plaintiff in actions by or against corporations, see CORPORATIONS, 1.

Rights and liabilities as to costs, see COSTS, 1.

In action for delivery of deed, see ESCROWS, 3.

Persons concluded by judgment, see JUDGMENT, 2, 4.

Right of contract creditors to intervene in foreclosure of mortgage, see MORTGAGES, 3.

Misconduct ground for new trial, see NEW TRIAL.

Plaintiff in action to cancel deed to state lands, see PUBLIC LANDS, 3-5.

Persons entitled to defense of usury, see USURY, 5.

PARTNERSHIP:

Admissibility of testimony establishing partnership with decedent, see WITNESSES, 3.

PARTNERSHIP—CONTINUED.

1. PARTNERSHIP — EXISTENCE OF RELATIONSHIP — EVIDENCE — SUFFICIENCY. There is not sufficient evidence to establish a partnership relation between a mother and son from the fact that, for twenty years before the son became insane, his mother had lived with him, advanced money for, took a general interest in, and rendered services without pay in the conduct of a fish and poultry business, conducted in the name of C. Brothers, where it appears that the son transferred the business to a corporation in consideration of stock issued to him; that the mother drew money from the business for household expenses, which, after the corporation was formed, was charged to the son; and all the circumstances were as consistent with the relation of mother and son as with that of partnership, of which there was no direct testimony. *Chlopeck v. Chlopeck*..... 256

2. PARTNERSHIP—TERMINATION—ABSENCE—EXTRA COMPENSATION. A partnership to cut certain timber is not terminated by temporary absence of one partner; and mere inequality of service is not alone ground for compensating the one doing the greater service, in the absence of an express or implied agreement therefor. *Williams v. Pedersen* 472

PART PERFORMANCE:

To satisfy statute of frauds, see FRAUDS, STATUTE OF, 3, 4.

PARTY WALLS:

1. PARTY WALLS—AGREEMENTS—VENDOR AND PURCHASER—TITLE—DEFECTS—SPECIFIC PERFORMANCE—DECREE. A party wall agreement, expressly made to run with the land and binding upon the parties and their assigns, containing a covenant to pay one-half the cost of the wall when the wall shall be used, passes the right to compensation to the grantee of the building at the time of such use, and cannot be enforced or discharged until such time; hence an agreement to convey, by warranty deed, lots encumbered by such agreements, is performed by deed of general warranty, and specific performance thereof may be decreed; but the decree cannot require the vendor to discharge the lien or deposit one-half such cost to await the time of payment. *Hoffman v. Dickson*..... 431

PAYMENT:

By receiver after notice of appeal, see APPEAL AND ERROR, 51.
For services, see MASTER AND SERVANT, 3.
Inequality of services as ground for, see PARTNERSHIP, 2.
To agent, see PRINCIPAL AND AGENT.
By principal as discharging surety, see PRINCIPAL AND SURETY, 2.
Of tax as ground for collateral attack on judgment, see TAXATION, 2.
Recovery of usury paid, see USURY, 2, 3.

PENALTIES:

Under contracts, see DAMAGES, 2, 3.
For usurious exaction of interest, see USURY, 2, 3.

PENDENCY OF ACTION:

Effect on limitation of other action, see LIMITATION OF ACTIONS.

PERFORMANCE:

Affecting operation of statute of frauds, see FRAUDS, STATUTE OF, 3, 4.

PERSONAL INJURIES:

See MUNICIPAL CORPORATIONS, 5; NEGLIGENCE.
To passenger, see CARRIERS, 4-12, 14.
Inadequate and excessive damages, see DAMAGES, 4-14.
To traveler on highway, see HIGHWAYS.
Recovery over by city for amount paid on judgment, see INDEMNITY.
Right of infant to recover for loss of time, see INFANTS.
To employee, see MASTER AND SERVANT.
To persons on cars or on or near street railroad tracks, see STREET RAILROADS.

PETITION:

In condemnation proceedings, see EMINENT DOMAIN, 22.

PHYSICIANS AND SURGEONS:

Neglect of physician as defense in prosecution for manslaughter, see HOMICIDE, 2.
Confidential communication between physician and patient, see WITNESSES, 5.

PILOTS:

Statute defining qualifications, see CONSTITUTIONAL LAW, 2.
Scope of statute regulating pilots, see STATUTES, 2.

1. PILOTS—REGULATION—POWER OF STATE. The legislature has power to regulate pilotage of the public waters within the boundaries of the state so far as relates to vessels engaged in strictly foreign commerce, since Congress has not attempted to regulate the same. *State v. Ames* 328

2. PILOTS—STATUTES—CONSTRUCTION. The pilotage law, Bal. Code, §§ 3216-3243, applies to vessels propelled by steam as well as sailing vessels. *State v. Ames*..... 328

3. SAME. The pilotage law, Bal. Code, §§ 3216-3243, as amended by Laws 1901, p. 17, is not objectionable as indefinite or as prescribing different penalties for the same offense. *State v. Ames*..... 328

PLACE:

Of delivery of goods by carrier, see CARRIERS, 2, 3.

PLEA:

In civil actions, see PLEADING.

PLEADING:

Presumption as to amendment, see APPEAL AND ERROR, 25, 26.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 40.
On new trial after remand, see APPEAL AND ERROR, 47.
Filing of, as appearance, see APPEARANCE.
Complaint and issues upon hearing to regulate freight rates, see CARRIERS, 1.
In action for injuries to passengers, see CARRIERS, 4, 5, 7, 9.
As surprise justifying continuance, see CONTINUANCE, 2.
Damages, see DAMAGES, 18.
In action for divorce, see DIVORCE, 1.
Waiver of plea of *res judicata*, see JUDGMENT, 7.
Defense in action to vacate judgment, see JUDGMENT, 1.
In action by servant for personal injuries, see MASTER AND SERVANT, 17.
In action to quiet title, see QUIETING TITLE.
Ejectment to recover land sold for taxes, see TAXATION, 5.
In action to recover usury paid, see USURY, 4.

1. PLEADING — ANSWER — AFFIRMATIVE ALLEGATIONS—REPLY—NECESSITY. In an action to quiet title to property levied upon as that of the community and claimed by the plaintiff as her separate property, an answer affirmatively alleging that the same was community property, amounts to no more than a denial and requires no reply. *Dueber v. Wolfe*..... 634

2. PLEADING—VARIANCE—ISSUES AND PROOF. An indefinite memorandum of a settlement between parties, making no reference to a wheat transaction in controversy, is inadmissible to show a settlement when none was pleaded. *Wees v. Page*..... 213

3. PLEADING—COMPLAINT—DEMURRER — WAIVER. An order overruling a demurrer to a complaint for want of sufficient facts, followed by an answer, does not preclude the court from sustaining defendant's objection to any evidence at the trial on the ground that the complaint does not state sufficient facts, and that the evidence offered was insufficient to warrant a decree, where, under the most liberal rules of construction, the defect in the complaint and cause of action was one of substance which could not be cured by amendment. *O'Day v. Ambaum*..... 684

PLEDGES:

See CHATTEL MORTGAGES.

POLICY:

Of insurance, see INSURANCE.

POLL TAX:

Persons liable for poll tax, see TAXATION, 1.

POSSESSION:

As part performance of oral agreement, see FRAUDS, STATUTE OF, 3.
To support suit to quiet title, see QUIETING TITLE.
Of defendant necessary to replevin, see REPLEVIN.

POWER OF ATTORNEY:

See PRINCIPAL AND AGENT.

POWERS:

Of county board to employ counsel, see COUNTIES, 3.

PRACTICE:

See APPEAL AND ERROR; APPEARANCE; ATTACHMENT; CERTIORARI; CONTINUANCE; COSTS; DIVORCE; EXECUTION; INJUNCTION; JUDGMENT; LIMITATION OF ACTIONS; PLEADING; PROHIBITION; TRIAL.
Procedure of particular courts, see COURTS.
Condemnation proceedings, see EMINENT DOMAIN.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 38-40.
Ground for reversal in criminal prosecution, see CRIMINAL LAW, 3.

PRESUMPTIONS:

As to negligence, see CARRIERS, 5, 7, 9, 12.
Regularity of proceedings to establish county road, see HIGHWAYS, 3.

PRINCIPAL AND AGENT:

See BROKERS, 1.
Existence of relation upon sale of land by broker, see BILLS AND NOTES, 2.
Agency of carrier in transportation of goods, see CARRIERS, 2, 3.
Delivery of deed to agent as delivery in escrow, see ESCROWS, 1.
Estoppel to claim relation, see ESTOPPEL, 1.
Master's liability for wrongful acts or commissions of servant, see MASTER AND SERVANT, 25.

1. PRINCIPAL AND AGENT—AUTHORITY—POWER OF ATTORNEY. A power of attorney authorizing an agent to collect monies, does not empower him to receive wheat as a payment on the principal's note. *Wees v. Page* 213

PRINCIPAL AND SURETY:

See INDEMNITY.
Right to set aside fraudulent conveyance by debtor, see FRAUDULENT CONVEYANCES.
Conclusiveness as against sureties of judgment against principal, see JUDGMENT, 2.

PRINCIPAL AND SURETY—CONTINUED.

1. PRINCIPAL AND SURETY—BOND GUARANTEEING LEASE—CONSTRUCTION—EXPIRATION OF LEASE—LIABILITY OF SURETIES. The sureties upon a bond guaranteeing the faithful performance of the lease of a steamer, on the part of the lessees, in which lease it was provided that the steamer should be kept free from liens and especially that it be delivered to the owners on the termination of the lease, are liable for the amount of liens accruing against the vessel after the termination of the lease, where the lessees failed to return the same to the owners as required by the lease; and it is immaterial that the place of the return was not designated. *Mitchell, Lewis & Staver Co. v. Beeson* 648

2. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—PREMATURE PAYMENT. Premature payments or advances, of a part of installments falling due to a contractor, do not discharge a bonding company which was surety on the building bond, where the contractor shortly became entitled to the payments, which were then deducted from the amounts due him, and the payments could not have operated to the prejudice of the bonding company. *Monro v. National Surety Co.* 488

3. SAME—NOTICE OF DEFAULT—DELAY IN GIVING—EFFECT. Where a building was to be completed September 15, and the first notice of default to the surety company was given November 22, the delay in giving notice releases the surety only as to claims for demurrage or failure to complete the building on time, and not as to damages arising from lien claims. *Monro v. National Surety Co.*..... 488

4. SAME—TIME FOR BRINGING ACTION—LIMITATIONS. Where an indemnity bond required action to be brought within six months after the time fixed in the contract for the completion of the work, which was September 15, 1905, an action commenced March 12, 1906, is within time. *Monro v. National Surety Co.*..... 488

PRISONS:

Restraint of the person without lawful authority, see FALSE IMPRISONMENT.

PRIVATE NUISANCE:

See NUISANCE.

PRIVILEGED COMMUNICATIONS:

Disclosure by witness, see WITNESSES, 4, 5.

PROBATE:

Of will, see WILLS, 2.

PROCESS:

Effect of appearance, see APPEARANCE.

In foreclosure of delinquency tax certificate, see TAXATION.

PROHIBITION:

1. PROHIBITION—TO COURTS—ADEQUATE REMEDY BY APPEAL—CHANGE OF VENUE. Prohibition does not lie to prevent the trial of a cause after erroneously refusing to grant a change of venue, whereby the court has no further jurisdiction; since there is an adequate remedy by appeal, which is not affected by the fact of delay or expense not ultimately destroying the effectiveness of the judgment. *State ex rel. LaFurgey v. Superior Court*..... 154
2. PROHIBITION—OTHER ADEQUATE REMEDY—VALIDITY OF ORDINANCE. Prohibition does not lie to prevent a trial for the violation of a city ordinance, which is claimed to be void; since there is an adequate remedy by appeal or by writ of *habeas corpus*. *State ex rel. Martin v. Hinkle* 156

PROMISSORY NOTES:

See BILLS AND NOTES.

PROOF:

Of loss in action on certificate or policy of insurance, see INSURANCE.

PROPERTY:

Adverse possession, see ADVERSE POSSESSION.
Measure of damages for injuries to property, see DAMAGES, 1, 17-19.
Award of on granting decree of divorce, see DIVORCE, 3.
Taking for public use, see EMINENT DOMAIN.
Contract for sale of land as gift *causa mortis*, see GIFTS, 2.
Separate or community property, see HUSBAND AND WIFE.
Protection of rights of property by injunction, see INJUNCTION.

PUBLIC LANDS:

Jurisdiction to determine rights of claimants to, see COURTS, 1.

1. PUBLIC LANDS—TIDE LANDS—SALES—APPLICATION—IMPROVEMENTS. Upon application for a sale of state tide lands, the applicant must advise the board of land commissioners of the true condition of the lands with respect to improvements, and it is no excuse that he claims the improvements thereon to be not of the character contemplated by the statute, or that he was not advised thereof. *State ex rel. Shores v. Ross*..... 210
2. SAME—COLLUSION AT SALE—EVIDENCE — SUFFICIENCY. The evidence sufficiently shows collusion among bidders at a sale of state tide lands, warranting a refusal to deliver a deed therefor, where it appears that the applicant and two real estate speculators were the only bidders present at the sale, that after consultation among them, one of the speculators withdrew, and that three lots of the value of $2,000 were struck off for $87.50, one to the applicant and two to the other speculator, who immediately directed receipts to be made to the applicant, whose representative then signed an agreement to pay $500 for services, $200 of which was to go to one of the speculators and $300 to the other. *State ex rel. Shores v. Ross*. 210

PUBLIC LANDS—CONTINUED.

3. PUBLIC LANDS—CANCELLATION OF DEED — PARTIES. An action to cancel a deed of state lands cannot be maintained by a person who has no interest in the property, as the state is a necessary party plaintiff where the land reverts to the state. *Powers v. Webster* 99

4. SAME—INTEREST OF PRIVATE CITIZEN. A private citizen, who was fraudulently prevented by state officers from bidding at a sale of state lands, has no such interest in the lands as to entitle him to maintain a suit to cancel the deed from the state, as he could not require it to be resold. *Powers v. Webster*..... 99

5. SAME—TAXPAYER. A taxpayer cannot maintain a suit to cancel a deed fraudulently made by state officers, as he suffers no injury different from that suffered by the public at large. *Powers v. Webster* 99

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN, 1, 2, 4.

QUESTION FOR JURY:

See MASTER AND SERVANT, 1, 8, 9, 23, 24.
In criminal prosecutions, see CRIMINAL LAW, 4.
Permanency of injuries in action for damages, see DAMAGES, 16.
Justification for use of weapon in prosecution for manslaughter, see HOMICIDE, 1.

QUIETING TITLE:

See PLEADING, 1.
Decision on appeal, see APPEAL AND ERROR, 45.
Right of action by *bona fide* purchaser, see EXECUTION.

1. QUIETING TITLE—PRIMA FACIE CASE. In an action to quiet title, a plaintiff in possession under record title is entitled to judgment unless the defendant's evidence overcomes or avoids such title. *White v. McSorley*..... 18

2. QUIETING TITLE—PLEADING—COMPLAINT—SUFFICIENCY. That the complaint in an action to quiet title does not show that the plaintiff was in possession or that the land was unoccupied is not ground for objection, if it states facts entitling the plaintiff to any relief. *Dueber v. Wolfe*..... 634

RAILROADS:

Carriage of goods and passengers, see CARRIERS.
Injuries to passengers, see CARRIERS, 4-14.
Exercise of power of eminent domain, see EMINENT DOMAIN, 4, 6-9, 14, 15.
Injuries to persons on or near street railway tracks, see STREET RAILROADS.

RAPE:

Sufficiency of evidence for conviction, see CRIMINAL LAW, 4.

REAL ACTIONS:

Actions for recovery of real property founded on possession, see EJECTMENT.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF.

RECEIPTS:

For rent as sufficient memorandum to satisfy statute of frauds, see FRAUDS, STATUTE OF, 2, 6.

RECEIVERS:

Appealability of decision made in receivership proceedings, see APPEAL AND ERROR, 1-3.

Liability for money paid under order of court after notice of appeal, see APPEAL AND ERROR, 51.

In action to foreclose mortgage, see CHATTEL MORTGAGES, 2.

RECORDS:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 11, 16, 19, 20.

Effect on purchasers of record of assignment and satisfaction of mortgage, see MORTGAGES, 2.

Conditional sale contract, see SALES, 3, 4.

As notice affecting *bona fides* of purchase of land, see VENDOR AND PURCHASER, 4, 5.

REDEMPTION:

From sale on execution, see EXECUTION.

REDUCTION:

Of recovery, see DAMAGES, 4, 13, 14, 15.

RELATIONSHIP:

See MASTER AND SERVANT, 1.

Existence of, see PARTNERSHIP, 1.

RELEASE:

Liability as surety, see PRINCIPAL AND SURETY, 3.

REMOVAL:

Of county seat, see COUNTIES, 1, 2.

REMOVAL OF CAUSES:

Change of venue or place of trial, see VENUE.

REOPENING CASE:

For further evidence, see TRIAL, 4.

REPEAL:

Of statute relating to sale of spirituous liquors, see INTOXICATING LIQUORS.

Of city ordinance or resolution by general law, see MUNICIPAL CORPORATIONS, 1.

Of statute, see STATUTES, 3.

REPLEVIN:

Recovery of property, sold under conditional sale, see SALES, 4.

1. REPLEVIN—DEFENSES—POSSESSION OF DEFENDANT. The rule that replevin does not lie against one not in possession of the property, does not obtain where the defendant had been in possession and wrongfully disposed of the property prior to the commencement of the action, without the knowledge of the plaintiff at the time. *Andrews v. Hoeslich*..... 220

2. SAME—TENDER—KEEPING GOOD. If, in an action of replevin for property pawned, plaintiff is obliged to keep good his tender of the sum received on the pledge, it is sufficient if the money was paid into court and remained there before service of summons upon defendant, although not paid, as alleged, with the filing of the complaint. *Andrews v. Hoeslich*..... 220

REPLY:

See PLEADING, 1.

REQUESTS:

For instructions in civil actions, see TRIAL, 10, 12, 13.

RESCISSION:

Of contract for sale of land, see VENDOR AND PURCHASER, 1, 3.

RES GESTAE:

In criminal prosecutions, see CRIMINAL LAW, 2.

RESIDENCE:

For purposes of divorce, see DIVORCE, 1.

RES JUDICATA:

See JUDGMENT, 3-7.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 46, 49.

Judgment concluding claim for loss of time in action by guardian for injuries to minor, see INFANTS.

REVENUE:

See TAXATION.

REVIEW:

By higher court by appeal or error for errors or irregularities, see APPEAL AND ERROR.
Statutory writ of review, see CERTIORARI.
In criminal prosecution, see CRIMINAL LAW, 3, 4.
Of proceedings to establish highways, see HIGHWAYS, 1, 5.

REVOCATION:

Of pardon, see PARDON, 1.
Of will, see WILLS, 1.

RIPARIAN RIGHTS:

Condemnation of, see EMINENT DOMAIN, 3.
Reasonable use of water, see WATERS AND WATER COURSES, 1.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 9, 10, 19-21.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 5, 7, 8, 16, 17.

SALARY:

Increase during term of office, see STATUTES, 3.

SALES:

Parol evidence as to failure of consideration, see EVIDENCE, 3.
On execution, see EXECUTION.
Of intoxicating liquors, see INTOXICATING LIQUORS.
Of state lands, see PUBLIC LANDS.
Of real property, see VENDOR AND PURCHASER.

1. SALES—BREACH OF WARRANTY—DEFENSES—CONTRACTS — CITY ORDINANCE AS PART OF CONTRACT. In an action upon a warranty of computing scales that it would weigh correctly, to recover losses sustained by reason of false weights, which were not discovered until inspection by a city inspector, an ordinance of the city forbidding the use of any weight or scale until the same is inspected, is a defense to the action, as the ordinance becomes a part of the contract. *Wright v. Computing Scale Co.* 107

2. SALES—BREACH OF WARRANTY—DAMAGES. The measure of damages upon breach of a warranty that scales will weigh correctly is the sum paid therefor, and does not include losses by reason of false weights, where a city ordinance prohibited the use of any weight or scale until the same was inspected by a city inspector, and such an inspection, or ordinary care on the part of the purchaser, would have disclosed the defect in the scales. *Wright v. Computing Scale Co.* 107

SALES—CONTINUED.

3. SALES—CONDITIONAL SALES—DESCRIPTION. Under Laws 1903, p. 6, § 1, providing that a conditional sale shall be absolute as to purchasers, incumbrancers or subsequent creditors in good faith, unless within ten days a memorandum of such sale is filed in the county wherein the vendee resides, a description in a memorandum of sale of an engine contains a sufficient description to put purchasers on inquiry, although the location of the engine is wrongly stated and it could not be identified, when the index book required to be kept by the auditor showed the time of filing, name of vendor and vendee, date of instrument, and amount of purchase price, and inquiry prosecuted would have disclosed that it was the only engine owned by the vendee in that county. *Wittler-Corbin Machinery Co. v. Martin*. 123

4. SAME—REMEDIES OF SELLER—BONA FIDE PURCHASERS—BURDEN OF PROOF—MEMORANDUM OF SALE—EVIDENCE. In replevin by a vendor to recover an engine under the terms of a conditional sale, after the filing of a memorandum of the sale in the auditor's office, the burden of proof is upon the defendants to prove their allegations that they are *bona fide* purchasers without notice; and the memorandum of sale and proof of its filing is admissible in evidence to prove plaintiff's title. *Wittler-Corbin Machinery Co. v. Martin*..... 123

SATISFACTION:

Records as notice of satisfaction of mortgage by assignee, see MORTGAGES, 2.

SEALS:

As consideration for bond, see CONTRACTS.

SECURITY:

For costs, see COSTS, 2.

SELF-DEFENSE:

Defenses in prosecution for homicide, see HOMICIDE, 1.

SEPARATE ESTATE:

Of married women, see HUSBAND AND WIFE, 3, 5, 6.

SERVICE:

See WORK AND LABOR.

SHIPPING:

Jurisdiction and proceedings in admiralty, see ADMIRALTY.
Regulation of pilotage laws, see PILOTS.

SIDEWALKS:

Injuries from defective condition, see NEGLIGENCE.

SPECIFIC PERFORMANCE:

Of contract by broker for sale of land, see BROKERS, 2.

Conveyance of land encumbered by party wall agreement, see PARTY WALLS.

1. SPECIFIC PERFORMANCE—CONDITIONS PRECEDENT—VENDOR AND PURCHASER—RESCISSION BY VENDOR—TENDER. A tender of performance by the vendee is not a condition precedent to an action for specific performance of a contract to sell land, where, before the time for performance had arrived, the vendor declared a rescission and repudiated the contract. *Bruggemann v. Converse*..... 581

2. SPECIFIC PERFORMANCE—ACCOUNTING—EVIDENCE—SUFFICIENCY. In an action for specific performance and an accounting, findings in favor of the plaintiff are sustained by the evidence when it appears that the defendant admitted the account, except as to $150, and there was evidence that he did receive such sum, and that such payment constituted full performance of the contract by plaintiff. *Muir v. Beck* 37

STARE DECISIS:

Rule of decision on appeal, see APPEAL AND ERROR, 46.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 20.

STATES:

Courts, see COURTS.

Power of governor to revoke pardon, see PARDON, 1.

Regulation of pilotage laws, see PILOTS.

Public lands, see PUBLIC LANDS.

Amendment relating to increase of officer's salary during term of office, see STATUTES, 3.

STATUTES:

See FRAUDS, STATUTE OF; LIS PENDENS.

Assignment of bill of exchange, see BILLS AND NOTES, 1.

Compliance with as condition precedent to do business, see BUILDING AND LOAN ASSOCIATIONS.

Control and regulation of carriers, see CARRIERS, 1.

Granting special privileges or immunities, see CONSTITUTIONAL LAW.

Purposes for which corporations may be formed, see CORPORATIONS, 2.

Improvements in ejectment, see EJECTMENT.

Proceedings to take property for public use, see EMINENT DOMAIN, 21.

Establishment of highways, see HIGHWAYS, 4.

Licensing sale of intoxicating liquors, see INTOXICATING LIQUORS.

Statutes of limitation, see LIMITATION OF ACTIONS.

Extraterritorial force, see MARRIAGE.

Time and method of payment for services, see MASTER AND SERVANT, 3.

STATUTES—CONTINUED.

Repeal of municipal ordinances, see MUNICIPAL CORPORATIONS, 1.
Power of governor to revoke pardon, see PARDON, 1.
Regulation of pilotage laws, see PILOTS.
Revocation of wills by subsequent marriage, see WILLS, 1.

1. STATUTES—VALIDITY OF PORTION. The invalidity of a provision for a penalty for acts made misdemeanors does not affect the balance of the act, as the misdemeanors are punishable under the general statute, Bal. Code, §§ 6776, 7435. *State v. Ames*..... 328

2. STATUTES—TITLE—SUBJECTS INCLUDED—PILOTAGE. An act entitled "to establish pilot regulations" in certain waters, is broad enough to include provisions relating to a penalty for violation of the statute. *State v. Ames*..... 328

3. STATUTES— AMENDMENTS — CONSTRUCTION — STATES — OFFICERS — TERM OF OFFICE—INCREASE OF SALARY. Laws of 1907, amending the law of 1901, relating to the state board of control, "so as to read as follows," does not repeal the provisions in the former (omitted from amendment) fixing the term of office and the time for the beginning thereof, where it was evident that the intent of the amendment was to change the salary and a few of the duties, and to deal with an existing office, not to create a new one; hence the salary of a member of the board under the old law cannot be increased during his term of office as fixed thereby, although he was reappointed on the taking effect of the amendment before his old term had expired. *State ex rel. Davis v. Clausen*..... 372

STREET RAILROADS:

Injuries to passengers, see CARRIERS, 4-14.
Conclusiveness of judgment against city for defects in streets, see JUDGMENT, 4.

1. STREET RAILROADS—INJURY TO PERSONS DRIVING ACROSS TRACK—CONTRIBUTORY NEGLIGENCE. The driver of an express wagon, who sees an approaching electric car about a block away and proceeds to drive across the street car track without giving any further heed to the car, is guilty of contributory negligence precluding any recovery for injuries from a collision between the car and his wagon. *Davis v. Coeur d'Alene & Spokane R. Co*..... 301

2. STREET RAILROADS—INJURY TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A pedestrian is guilty of contributory negligence, precluding a recovery, in walking on a street car track in a city where cars were constantly passing, at a point where the sidewalk and part of the street was fenced off or taken up with building operations, where there was room, every few feet, for him to get off the track to allow a car to pass and he failed to keep on the lookout for cars coming up behind. *Mey v. Seattle Electric Co.* 497

STREET RAILROADS—CONTINUED.

3. SAME—NEGLIGENCE OF MOTORMAN — EVIDENCE — SUFFICIENCY. In such a case, a motorman has the right to assume that the man would step off the track upon the approach of a car, and the company is not shown to be guilty of negligence by reason of running down the plaintiff, where the car was running at ordinary speed, and there was no proof that ordinary precautions were not taken. *Mey v. Seattle Electric Co*..... 497

STREETS:

See HIGHWAYS.

Injuries from defects in streets or sidewalks, see MUNICIPAL CORPORATIONS, 5; NEGLIGENCE, 1.

SURETYSHIP:

See PRINCIPAL AND SURETY.

SURPRISE:

Ground for continuance, see CONTINUANCE, 2.

SURVEYORS:

Duties of county surveyor in proceedings to establish highway, see HIGHWAYS, 4.

SURVEYS:

Description of boundaries, see BOUNDARIES, 1.

TAXATION:

Payment of taxes as ground for reversal, see APPEAL AND ERROR, 45.

Correction of erroneous limitation on taxing powers, see APPEAL AND ERROR, 46.

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 2-4.

1. TAXATION—UNIFORMITY—STREET POLL TAX. Laws 1905, p. 140, authorizing cities of the third and fourth classes to impose and collect an annual street poll tax from male inhabitants over 21 years of age, does not, by reason of the exemption of females and minors, violate Const. art. 7, § 9, requiring uniformity in city taxes in respect to persons and property; since the constitutional requirement as to uniformity does not forbid a proper classification of the subjects of the tax. *Tekoa v. Reilly*..... 202

2. TAXATION—TAX TITLE—VALIDITY—PAYMENT OF TAX—JUDGMENT—COLLATERAL ATTACK. Where taxes have in fact been paid by a nonresident owner, but a foreclosure for taxes resulted through the mistake of the county treasurer's office, a tax title secured by publication against a nonresident owner is void; and the same may be collaterally attacked under Laws 1897, p. 190, § 114, making the tax judgment conclusive in collateral proceedings "except where the tax or assessments have been paid." *Bullock v. Wallace*..... 690

TAXATION—CONTINUED.

3. TAXATION—DEEDS—DESCRIPTION. Tax foreclosure proceedings and a tax deed describing the property as 25 acres in a certain section are void for uncertainty in the description. *Miller & Sons v. Daniels* 411

4. SAME—LIEN FOR TAXES PAID—DESCRIPTION OF PROPERTY. A tax receipt, showing the payment of taxes on property described as 25 acres in a certain section, is too indefinite to entitle the party paying the tax to a lien on any property in the section. *Miller & Sons v. Daniels* 411

5. SAME—RECOVERY OF LAND SOLD FOR TAXES—EJECTMENT—PLEADING. Bal. Code, § 5679, requiring the complaint in an action to recover lands sold for taxes to allege that the tax had been paid or tendered does not apply to an ordinary action of ejectment, where the plaintiff was ousted by one claiming under a void tax title which, under the law of 1897, was subject to collateral attack from the fact that the tax had already been paid. *Bullock v. Wallace*..... 690

TENDER:

Review of error in withdrawal, necessity of exceptions, see APPEAL AND ERROR, 16.

In action for recovery of personal property, see REPLEVIN.

Necessity in action for specific performance, see SPECIFIC PERFORMANCE, 1.

TERMINATION:

Of partnership by absence of party, see PARTNERSHIP, 2.

TESTAMENT:

See WILLS.

THEATERS AND SHOWS:

Sunday closing, see CONSTITUTIONAL LAW, 1.

TIDE LANDS:

Disposal of state tide lands, see PUBLIC LANDS.

TIME:

For taking appeal or suing out writ of error, see APPEAL AND ERROR, 18.

For issuance of attachment, see ATTACHMENT.

Computation of period of limitation, see LIMITATION OF ACTIONS.

Of last sickness of testator, see WILLS, 3.

TITLE:

Color of title, see ADVERSE POSSESSION.

Of innocent purchaser at execution sale, see EXECUTION.

Removal of cloud, see QUIETING TITLE.

TITLE—CONTINUED.

Of statutes, see STATUTES, 2.

Tax titles, see TAXATION, 2.

Defect as ground for rescission of sale of land, see VENDOR AND PURCHASER, 3.

Acquired by *bona fide* purchaser of land, see VENDOR AND PURCHASER, 6.

TORTS:

See FRAUDS; NEGLIGENCE; NUISANCE.

Jurisdiction in admiralty, see ADMIRALTY.

In carriage of passengers, see CARRIERS.

Damages, nominal or substantial, see DAMAGES, 1.

Causing death, see DEATH.

Restraint of the person without sufficient authority, see FALSE IMPRISONMENT.

Computation of period of limitation, see LIMITATION OF ACTIONS.

Injuries by employees, see MASTER AND SERVANT, 25.

Injuries caused by operation of street cars, see STREET RAILROADS.

Obstruction and detention of natural water courses, see WATERS AND WATER COURSES.

TRAPDOORS:

Care required as to trapdoors, see NEGLIGENCE.

TRESPASS:

Restraint of the person without sufficient authority, see FALSE IMPRISONMENT.

Restraining trespass, see INJUNCTION.

TRIAL:

Review of rulings as dependent on presentation of evidence, see APPEAL AND ERROR, 10.

Review of rulings as dependent upon presentation of objection in lower court, see APPEAL AND ERROR, 10.

Review of rulings as dependent on exception in lower court, see APPEAL AND ERROR, 11-14, 16.

Reopening case, preservation of grounds for review, see APPEAL AND ERROR, 17.

Necessity for including findings in transcript, see APPEAL AND ERROR, 20.

Review as dependent on specifications in assignment of error, see APPEAL AND ERROR, 21.

Review of discretionary action, see APPEAL AND ERROR, 23, 27.

Presumptions on appeal or writ of error, see APPEAL AND ERROR, 25, 26.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 38-40.

TRIAL—CONTINUED.

Waiver of errors on appeal, see APPEAL AND ERROR, 30-33.
Misconduct of counsel in reading decision as harmless error, see APPEAL AND ERROR, 42.
Conclusiveness of findings on conflicting evidence, see APPEAL AND ERROR, 28.
Separation of findings, necessity, see ATTORNEY AND CLIENT, 2.
Instructions in action for injuries to passengers, see CARRIERS, 4, 6, 8, 9.
Review on certiorari, see CERTIORARI.
Continuance in civil actions, see CONTINUANCE.
In criminal prosecutions, see CRIMINAL LAW.
Objections to admission of depositions, see DEPOSITIONS.
Condemnation proceedings, see EMINENT DOMAIN, 14, 17-20.
View by jurors in condemnation proceedings, see EMINENT DOMAIN, 18.
Verdict in favor of coemployee as discharge of master, see MASTER AND SERVANT, 4.
Instructions in actions for personal injuries, see MASTER AND SERVANT, 13, 14, 18, 19.
Motions and grounds for new trial, see NEW TRIAL.
Mode of proceedings to determine question of violation of conditional pardon, see PARDON, 2.
Objections to evidence on ground of defects in pleadings, see PLEADING, 3.
Prohibiting trial of cause, see PROHIBITION.
Examination of witnesses, see WITNESSES.

1. TRIAL—VIEW BY JURY. Under Bal. Code, § 4998, the court may appoint a person other than an officer to point out a place to be viewed by a jury. *In re Jackson Street*..... 243

2. SAME—OBJECTIONS—NEW TRIAL—APPEAL—HARMLESS ERROR. The objections that a person appointed to point out property to a jury in making a view is an interested witness, and was not sworn, are too late if first made on motion for a new trial; and are not ground for reversal unless it is shown that a substantial right of the party was prejudiced. *In re Jackson Street*..... 243

3. TRIAL—COMMENT OF JUDGE—RECEPTION OF EVIDENCE—WITNESSES—CREDIBILITY. It is unlawful comment for the trial judge, in overruling an objection to evidence, to remark that he did not consider it very material or entitled to much weight; and the same is prejudicial error where the same related to the intoxication of the plaintiff and affected the credibility of his evidence at the time in question, as to which there was a sharp conflict in the evidence. *Schneider v. Great Northern R. Co*..... 45

TRIAL—CONTINUED.

4. TRIAL — RECEPTION OF EVIDENCE — REOPENING CASE — DISCRETION. Where plaintiff rested after introducing certain evidence and the defendant declined to offer evidence, the oral announcement by the court that, while in grave doubt upon certain points, it would find for the defendants, does not prevent the court from reopening the case for further testimony by the plaintiffs, two days later, on due application and notice, before entry of formal judgment; the opening of the case being discretionary under such circumstances. *Reiff v. Coulter* 678

5. TRIAL—CHALLENGE TO EVIDENCE—EFFECT. A challenge to the sufficiency of the evidence should be overruled, if the testimony makes a case for the plaintiff, whether strictly within the pleadings or not. *Meyers v. Syndicate Heat & Power Co*..... 48

6. SAME—VERDICT—DISREGARD OF INSTRUCTIONS—OBJECTIONS. A challenge to the sufficiency of the evidence does not raise the objection that the jury disregarded an erroneous instruction which was binding on them, and under which there was not evidence to sustain the verdict. *Meyers v. Syndicate Heat & Power Co*..... 48

7. TRIAL—DIRECTION OF VERDICT—JUDGMENT NOTWITHSTANDING VERDICT. Insufficiency of the evidence may be urged after waiver of a nonsuit, by a motion to direct a verdict, or for judgment notwithstanding the verdict. *Adams v. Peterman Mfg. Co*..... 484

8. TRIAL—INSTRUCTIONS. The unnecessary repetition of instructions might be ground for reversal. *Chicago, Milwaukee & St. Paul R. Co. v. Alexander*..... 131

9. TRIAL—INSTRUCTIONS. Where the questions of negligence and contributory negligence are for the jury, each side is entitled to have the same submitted on proper instructions. *Gage v. Springston Lumber Co.* 141

10. TRIAL—INSTRUCTIONS—FORM—NEGLIGENCE—DAMAGES. The court cannot be compelled to give requested instructions in any set form of words, if their substance is given in the general charge; and requested instructions as to damages from negligence and the duty of the jury toward corporations, examined and held covered in the general charge. *Payne v. Whatcom County Railway & Light Co.* 342

11. SAME. Although instructions as a whole may be correct, the case should be reversed if some parts are confusing and misleading, to the possible prejudice of the appellant. *Gage v. Springston Lumber Co.* 141

12. TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse instructions given in the general charge. *Ranous v. Seattle Electric Co.* 544

TRIAL—CONTINUED.

13. TRIAL—INSTRUCTIONS—REQUESTS. Requested instructions are properly refused, if faulty, inapplicable, or covered by the general charge. *State v. Johnson* 227

14. TRIAL—VERDICT—SPECIAL FINDINGS—CONSISTENCY WITH GENERAL VERDICT — CARRIERS — NEGLIGENCE IN SETTING DOWN PASSENGERS. Where the complaint alleged the negligent starting of a street car while plaintiff was in the act of alighting, and that "at or about the time" plaintiff had one foot upon the steps of the car and one foot upon the pavement, a special finding by the jury that plaintiff had both feet on the steps, does not negative a general verdict for plaintiff, since it does not negative negligence of the defendant in starting the car while plaintiff was in the act of alighting; and since a construction of the special verdict should be adopted to sustain the verdict if it is susceptible thereof. *Grant v. Spokane Traction Co.* 112

TRUST COMPANIES:

Organization of corporations to do trust business, see CORPORATIONS, 2.

USURY:

1. USURY—EXACTION OF BONUS—EVIDENCE—SUFFICIENCY. Where a note for $5,000 was given for money loaned and secured upon real estate and by chattel mortgage on a flock of sheep purchased by the borrower at the same time, the evidence sustains findings to the effect that another note for $1,000, given by the borrower at the same time, was a usurious exaction and bonus for the loan and without consideration, where the testimony of the lender was to the effect that, on the day the note was given, the parties entered into an oral partnership to buy certain sheep, and go into the business of raising sheep, that nothing was done thereunder but that in less than an hour he sold out his interest in the firm and anticipated profits for $1,000, for which the note in question was given, and immediately thereafter made the $5,000 loan with which the sheep were purchased; the borrower denying any such partnership and testifying that the $1,000 was a bonus demanded for the loan. *Libert v. Unfried* 186

2. USURY—PENALTIES AND FORFEITURE—NOTE FOR BONUS AS ACCRUED INTEREST. Under the statutes limiting legal interest to twelve per cent, and providing that, in case of usury, the payee shall recover only the principal, less interest accrued, or less double the interest paid, the payee of a note for $5,000, with interest at 12 per cent, who exacted as a bonus for the loan another note for $1,000 with interest from maturity, has thereby contracted for usurious interest; and where suit was commenced on the $5,000 after maturity of the $1,000 note, the defendant is entitled to have credited on the note in

USURY—CONTINUED.

suit the $1,000 note and all interest accrued thereon, as usurious interest exacted and accrued at the time suit was commenced; also double the amount of all interest paid, and the amount of all other interest accrued on the $5,000 note. *Libert v. Unfried*..... 186

3. USURY—PENALTIES—COSTS—ATTORNEY'S FEES. Under the statute providing that in case of usury the defendant shall be entitled to costs, the plaintiff, upon being allowed recovery for principal, less penalties, is not entitled to attorney's fees or costs. *Libert v. Unfried* 186

4. USURY—PLEADING—NECESSITY. The defense of usury cannot be raised unless it is pleaded, especially where it does not appear on the face of the record. *Grubb v. Stewart*..... 103

5. SAME—DEFENSES—PERSONS ENTITLED. The defense of usury is personal to the parties and cannot be set up by strangers who were not creditors and who took property from one of the parties subject to and with notice of an alleged usurious transaction, which created a lien on the property. *Grubb v. Stewart*..... 103

VACATION:

Of judgment, see JUDGMENT, 1.
Tax judgment, see TAXATION.

VALUE:

Of land appropriated for public use as measure of compensation, see EMINENT DOMAIN, 5, 6, 11-15.
Value of property as basis for local improvements, see MUNICIPAL CORPORATIONS, 2.

VARIANCE:

Between pleading and proof in civil actions, see PLEADING, 2.

VENDOR AND PURCHASER:

Purchasers at sale on execution, see EXECUTION.
Evidence of conspiracy by vendor to defraud bank, see FRAUD.
Requirements of statute of frauds, see FRAUDS, STATUTE OF.
Contract for sale of land as gift, *causa mortis*, see GIFTS, 2.
Option distinguished from conditional sale, see MORTGAGES, 1.
Satisfaction of mortgage by assignee as notice to subsequent purchaser, see MORTGAGES, 2.
Right of purchasers as to party walls, see PARTY WALLS.
Sale of state lands, see PUBLIC LANDS.
Transfers of ownership of personal property, see SALES.
Specific performance of contract, see SPECIFIC PERFORMANCE, 1.

1. VENDOR AND PURCHASER—RESCISSION BY VENDORS — FRAUD — EVIDENCE—SUFFICIENCY. In an action for the rescission, by vendors, of a contract for the sale of land, the evidence is sufficient to show

VENDOR AND PURCHASER—CONTINUED.

that plaintiffs had been overreached by the fraudulent practices of the defendant, where it appears that defendant persuaded them to sign a receipt for $22,500, as a cash payment, upon defendants entering into a contract to resell a portion of the land for that sum, by which receipt the balance of the land sold was released from the conditions of the sale, while the defendant induced them to believe that the receipt had no such effect, and was not a receipt for a cash payment, it being unreasonable and inexplicable that the plaintiffs would have signed such a receipt except under the understanding represented to them by the defendant. *Stone v. Moody*..... 158

2. VENDOR AND PURCHASER—CONDITIONAL SALE—FORFEITURE—ACQUIESCENCE IN. After the time for completing a conditional sale had expired, a sale to a third person, not objected to for five years, constitutes a forfeiture of the conditional sale, acquiesced in by the purchaser. *Neeson v. Smith*..... 386

3. VENDOR AND PURCHASER—CONTRACT—MODIFICATION—ESTOPPEL TO ASSERT—RESCISSION. Where a written contract for the sale of real estate provided that if the title was not perfect, $500 paid on the purchase price should be returned, the vendee, after suit brought for the recovery of the $500 on the ground of defect in title, and receipt of payment of the judgment therefor, is estopped to assert that the written contract was changed by a verbal agreement to perfect the title, and that the suit was only a friendly suit to determine whether the title was perfect. *Reiff v. Coulter*..... 678

4. VENDOR AND PURCHASER—BONA FIDE PURCHASE—NOTICE—RECORD—DEFECTIVE TAX TITLE. A recorded quitclaim deed to the owner from a tax title grantee, although the wife did not join therein, is sufficient to put upon inquiry grantees claiming to be *bona fide* purchasers through mesne conveyances from the tax title grantee, who inadvertently made the second deed, where inquiry would have disclosed that the quitclaim was made to rectify a mistake which rendered the tax title void. *Bullock v. Wallace*..... 690

5. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—RECORDS—MORTGAGES—SATISFACTION. The fact that purchasers of property recorded their deed, before satisfaction of a mortgage by one holding an unrecorded assignment of the mortgage, does not prevent their being *bona fide* purchasers, where the assignment had been exhibited to them and arrangements made for its record, and they paid no part of the purchase price until after record of the assignment and satisfaction of the mortgage. *Christenson v. Raggio*..... 468

6. VENDOR AND PURCHASER—BONA FIDES—RIGHTS AS TO THIRD PERSONS. A purchaser from the record owner, for value and in good faith, without notice of an agreement that the record owner held title as security only, takes an absolute title in fee. *White v. McSorley*..... 18

VENUE:

Remedy for improper change or denial, see PROHIBITION.

1. VENUE—LOCAL ACTIONS—REMOVAL OF TIMBER. An action to rescind a contract for the removal of standing timber is local, and a change of venue to the county of defendant's residence is properly denied. *Seymour v. LaFurgey*..... 450

VERDICT:

Excessive damages, see DAMAGES.
In action for personal injuries, see MASTER AND SERVANT, 4.
In civil actions, see TRIAL, 6, 7, 14.
Directing verdict in civil actions, see TRIAL, 7.

VIEW:

By jury in civil actions, see TRIAL, 1.

VIEWERS:

In highway proceedings, see HIGHWAYS, 4.

WAGERS:

See GAMING.

WAGES:

Of servant, see MASTER AND SERVANT, 3.

WAIVER:

See ESTOPPEL.
Of exceptions or objections, see APPEAL AND ERROR, 14, 15.
Of error on appeal, see APPEAL AND ERROR, 29-33.
By appearance, see APPEARANCE.
Jurisdiction, see COURTS, 3.
Of damages by payment after stipulated time, see DAMAGES, 3.
Of provisions of contract as defense, see INDEMNITY, 3.
Of right to avoid certificate or policy of insurance, see INSURANCE.
Of objections to pleadings, see PLEADING, 3.
Objections to sufficiency of evidence after waiver of nonsuit, see TRIAL, 7.
Privilege of witnesses, see WITNESSES, 5.

WARNING:

Duty of master to give, see MASTER AND SERVANT, 7, 12, 22, 23.

WARRANTY:

On sale of goods, see SALES, 1, 2.

WASTE:

Right to injunctive relief, see INJUNCTION.

WATERS AND WATER COURSES:

Exercise of power of eminent domain, see EMINENT DOMAIN, 3, 22, 23.

1. WATERS—RIPARIAN RIGHTS—REASONABLE USE—LIMITATIONS. The reasonable use of waters by a riparian owner operating a mill does not extend to the flooding of adjacent lands by the maintenance of dams for a water power necessary to run the mill. *Durga v. Lincoln Creek Lumber Co*..... 477

2. SAME—DAMAGES—INJUNCTION—GROUNDS. Where there is natural drainage from plaintiff's lands across the land of an adjoining owner to a creek, the flooding of the adjoining owner's lands so as to flood any part of plaintiff's lands, or so as to cause the water to stand near the surface, or prevent drainage thereof, rendering the land unfit for cultivation, entitles plaintiff to injunctive relief. *Durga v. Lincoln Creek Lumber Co*..... 477

3. SAME—ESTOPPEL. A settlement and acceptance of the damages done in one year by flooding plaintiff's lands does not estop plaintiff from seeking injunctive relief in a following year. *Durga v. Lincoln Creek Lumber Co*..... 477

WEAPONS:

Justification for use in prosecution for manslaughter, see HOMICIDE, 1.

WILLS:

1. WILLS—REVOCATION—MARRIAGE—HUSBAND AND WIFE—STATUTES—CONSTRUCTION. The will of a *feme sole* is revoked by her marriage if her husband survives her, under Bal. Code, § 4598, so providing as to a man whose wife survives, and Bal. Code, § 4615, providing that words importing the masculine gender may be extended to females, when such construction is necessary, in view of our community property laws placing man and wife upon an equality as to property rights, testamentary capacity, and right of inheritance. *In re Petridge's Will*..... 77

2. WILLS — PROBATE — NONCUPATIVE WILL—VARIANCE—AMENDMENT. Upon the probate of a nuncupative will, the court may, in the exercise of its sound discretion, permit the alleged will and records to be amended to conform to the facts found. *In re Miller's Estate* 253

3. SAME—TIME OF LAST SICKNESS—NECESSITY OF EXTREMIS. A nuncupative will is made "during the last sickness" of the testator, without reference to the fact of extremis or that there was opportunity to reduce it to writing, where the testator expected he was in his last sickness and about to die, and did thereafter die thereof. *In re Miller's Estate*..... 253

WITNESSES:

See DEPOSITIONS.
Cross-examination in action for wrongful ejection of passenger, see CARRIERS, 14.
Opinions, see EVIDENCE, 4.
Conclusiveness of adjudication as against witnesses, see JUDGMENT, 2.
Comment by judge as affecting credibility, see TRIAL, 3.

1. WITNESSES—COMPETENCY—KNOWLEDGE OF FACTS. A witness knowing the fact from observation and experience may testify that trees were destroyed by the fumes from a smelter, although without expert knowledge. *Park v. Northport Smelting & Refining Co.*... 597

2. WITNESSES—COMPETENCY—DAMAGES — EVIDENCE — VALUE OF TIMBER. In an action for damages from the destruction of growing trees, a witness is competent to testify as to the number of thousand feet of saw timber on the land, although he was not an expert cruiser, where it appears that he measured the fallen trees and ascertained the number of feet therein and estimated the standing trees by comparison with the fallen trees of the same size. *Park v. Northport Smelting & Refining Co*..... 597

3. WITNESSES—COMPETENCY—TRANSACTION WITH INSANE PERSON. In an action between alleged partners, one of whom was insane, an adverse party cannot testify as to who composed the partnership, under Bal. Code, § 5991, prohibiting testimony of a transaction with an insane person by a party adversely interested. *Chlopeck v. Chlopeck* 256

4. WITNESSES—PRIVILEGED COMMUNICATIONS. Letters from a client to an attorney are not privileged as between themselves, where the client charges mismanagement of the cause and to enforce the privilege would deprive the attorney of the means of obtaining his rights. *Stern v. Daniel*..... 96

5. WITNESSES—PRIVILEGED COMMUNICATIONS — PHYSICIANS —WAIVER. In an action for personal injuries, the plaintiff does not waive the right to object to testimony by his physician by the fact that he himself testified as to the cause and extent of his injuries and described them as he saw and felt them, without reference to what his physician told him; Bal. Code, § 5994, subd. 4, prohibiting such testimony by a physician without the consent of his patient. *Noelle v. Hoquiam Lumber & Shingle Co*..... 519

6. WITNESSES—CROSS-EXAMINATION. In a criminal prosecution it is proper to allow cross-examination of the defendant's witnesses tending to discredit their positive statements. *State v. Katon*..... 1

7. WITNESSES—CROSS-EXAMINATION. In a personal injury case, upon cross-examination of plaintiff's husband, who was commonly called "doctor" and who had given to the conductor his address with a

WITNESSES—CONTINUED.

handbill advertising his treatment, it is proper to allow questions as to whether witness was a regular physician, and whether he had given treatment to his wife. *Grant v. Spokane Traction Co.*..... 112

WORK AND LABOR:

Estoppel to deny implied contract, see ESTOPPEL, 2.

1. WORK AND LABOR—SERVICES BY MEMBER OF FAMILY—IMPLIED CONTRACT—EVIDENCE—SUFFICIENCY. Where one who came to visit his brother remained, and the two lived together on the brother's place doing together the work necessary to obtain a living, the law will not imply any contract to pay for the services, and where there is no evidence of any acts or conduct from which an inference to pay therefor could be drawn, a verdict for such services is unwarranted, and a nonsuit should have been granted. *Hodge v. Hodge*..... 196

WRITS:

See CERTIORARI; INJUNCTION; PROHIBITION; REPLEVIN.

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